SUPREME COURT OF WISCONSIN

MARK ANDERSON and
JANET ANDERSON, his wife,

Plaintiffs-Appellants, Appeal No. 02-0980

v.

AMERICAN FAMILY MUTUAL
INSURANCE CO.,

Defendant-Respondent,

MARY ANNE BRASURE,

Defendant-Respondent-Petitioner,

GREGORY L. BRASURE,

Defendant-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER,
MARY ANNE BRASURE,
ON APPEAL FROM A DECISION OF COURT OF APPEALS-DISTRICT III,
DATED NOVEMBER 26, 2002,
REVERSING A PORTION OF THE ORDER ENTERED MARCH 11, 2002,
OF THE MARINETTE COUNTY CIRCUIT COURT,
HONORABLE TIM A. DUKET, PRESIDING.
CASE NUMBER 01-CV-77

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER, MARY ANNE BRASURE

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ISSUE PRESENTED FOR REVIEW

Under Wis. Stat. § 125.035(4)(b), is an adult underage consumer of alcohol who dies as a result of acute alcohol intoxication an "injured third party" such that he may sustain a cause of action against the provider of the alcohol?

STATEMENT OF THE FACTS

On or about March 19, 1999, Mary Anne Brasure ("Mary Anne") purchased a bottle of vodka. She left the bottle on her kitchen table with a note that said, "Greg, you owe me $12.00." Later that same day, Gregory Brasure ("Greg"), Mary Anne's adult son, and Craig Anderson ("Craig"), also an adult, left the Brasure home with the alcohol. That evening, Greg, Craig and another friend, Robert Tripp, consumed the alcohol at vacation property owned by Mary Anne and her husband, Garth, in rural Marinette County, Wisconsin. Tragically, on March 20, 1999, Craig died of acute alcohol intoxication.[1]

STATEMENT OF THE CASE

On March 19, 2001, Craig's parents, Mark and Janet Anderson (the "Andersons"), filed a wrongful death suit against Mary Anne, Greg, and the Brasures' insurer, American

[1] For the purposes of Mary Anne's Motion for Summary Judgment, the facts alleged in the Complaint were taken as true.

Family Mutual Insurance Company. Mary Anne moved for summary judgment[2] on the basis of Wis. Stat. § 125.035 (2), which provides immunity from civil liability arising from providing alcoholic beverages to another.

The Andersons argued that Wis. Stat. § 125.035(4)(b), which in limited circumstances nullifies the grant of immunity found in Wis. Stat. § 125.035(2), was applicable. The Andersons reasoned that Mary Anne provided the alcohol to Greg who in turn shared the alcohol with Craig. Because Craig was not a principal party to the transfer of alcohol from Mary Anne to Greg and because the alcohol provided to Greg was a substantial factor in causing Craig's death, Craig was an "injured third party" and Mary Anne was not entitled to immunity from civil liability.

The trial court, however, held that Mary Anne was entitled to immunity from civil liability under Wis. Stat. § 125.035 (2) because Craig was not an "injured third party" in that: (1) Mary Anne had provided alcohol to underage persons; (2) Craig was an underage consumer of the alcohol Mary Anne had provided; and (3) Craig died as a direct result of his own over-consumption of alcohol. Summary

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[2] Defendants Gregory Brasure and American Family also moved for summary judgment. The trial court entered a judgment (1) granting summary judgment finding Gregory immune, dismissing claims against him and American Family; (2) granting summary judgment finding that American Family's policy did not cover Gregory; and (3) denying summary judgment regarding American Family's coverage of Mary Anne, stating that there were genuine issues of material fact regarding her coverage. These judgments, and their treatment by the Court of Appeals, are not subject of this Petition for Review and are only included here for informational purposes.

judgment in favor of Mary Anne was entered on March 11, 2002.

The Andersons filed an appeal on April 4, 2002. The Court of Appeals held that two separable and distinct transactions had occurred. The Court of Appeals concluded that: (1) Mary Anne procured alcohol for her eighteen year old son, Greg; (2) Craig, who subsequently obtained the alcohol from Greg, was not a party to the transaction between Mary Anne and Greg; and (3) Mary Anne's provision of alcohol to Greg was a substantial factor in Craig's death. Therefore, the Court of Appeals reasoned, Craig was an "injured third party" as contemplated by the statute. Based upon the foregoing transactional focus and methodology, the Court of Appeals held that Mary Anne was not entitled to immunity from civil liability under Wis. Stat. § 125.035(2).

The Wisconsin Supreme Court granted the Petition For Review filed on behalf of Mary Anne Brasure on April 22, 2003.

STANDARD OF REVIEW

The Wisconsin Supreme Court reviews summary judgments *de novo*, applying the same methodology as the circuit court. Green Spring Farms v. Kersten, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Interpretation of a statute is a question of law, also reviewed *de novo*. Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 774-75, 461 N.W.2d 150 (Ct. App. 1990).

ARGUMENT

I. KWIATKOWSKI V. CAPITOL INDEMNITY CORP., 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990) AND ITS PROGENY ARE CONTROLLING IN THIS CASE.

Wis. Stat. 125.035 provides in pertinent part:

> (2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person..
>
> (4)(a) In this subsection, "provider" means a person, including a licensee or permittee, who procures alcohol beverages for or sells, dispenses or gives away alcohol beverages to an underage person in violation of s. 125.07 (1)(a).
>
> (4)(b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party..

In a case of first impression regarding the interpretation of Wis. Stat. § 125.035 (4)(b), Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990), the Court of Appeals faced the same question as the ultimate question presented here. The Court observed that "[w]hile the statute clearly explains who can be a defendant, it does not state who can be a plaintiff." Stated another way, the statute does not clearly explain who is an "injured third party". The Court of Appeals held that a minor procurer and consumer of alcohol who subsequently causes injury to himself while intoxicated is not an

"injured third party" and may not sustain a cause of action against the provider of alcohol.

In Kwiatkowski, the injured plaintiff, Raymond Kwiatkowski, was an underage person who procured and consumed alcohol at an establishment called the Red Lion Entertainment Center owned by Schmechel. Id. at 771, 461 N.W.2d 150 (Ct.App. 1990). While at the Red Lion, Kwiatkowski procured alcohol beverages from two sources. He procured alcohol directly from the bartender of the Red Lion and indirectly from the Red Lion through his friend, Amy Pedersen. Id. Kwiatkowski commenced suit against Schmechel and Pedersen when he was later injured in an accident while operating a motor vehicle while intoxicated. Id.

The trial court dismissed Kwiatkowski's Complaint against Schmechel and Pedersen, holding that Wis. Stat. § 125.035 (4)(b) did not permit the suit because Kwiatkowski was not an "injured third party". Id. at 770, 461 N.W.2d 150 (Ct. App. 1990). In affirming the decision of the trial court, the Court of Appeals properly focused its attention on the actions of the underage Kwiatkowski in procuring

alcohol, consuming alcohol and causing his own injuries.[3] Id. The Court of Appeals did not in any way attempt to distinguish the transactions in which Kwiatkowski directly procured alcohol from Schmechel from those in which Kwiatkowski indirectly procured alcohol through Pedersen. The fact that Kwiatkowski's injuries resulted from his own consumption of alcohol beverages was sufficient to underpin the determination that the immunity exception did not apply. Id.

In the present case, the Complaint alleges that "..Mary Anne Brasure purchased a 1.75 liter bottle of vodka which she provided to the defendant, Gregory Brasure and/or Craig P. Anderson" and further alleges that "Mary Anne Brasure was negligent in providing alcohol to people under the legal drinking age and allowing individuals under the legal drinking age to leave their home with the alcohol she purchased." Complaint at P. 8 and 15. There is no question that Mary Anne meets the statutory definition of a "provider" of alcohol to Craig, as someone who "sells, dispenses or gives away" alcohol to an underage person. Wis.

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[3] In Miller v. Thomack, 204 Wis. 2d 242, 263, 555 N.W.2d 130 (Ct. App. 1996), the Court of Appeals stated, "our entire discussion on § 125.035 as a derogation of common law is dictum, and we withdrew the last two paragraphs of the opinion." The withdrawal of dictum, however, does not undermine the Court of Appeals' interpretation of Wis. Stat. § 125.035 as to who is an "injured third party" or its holding that a minor consumer of alcohol who causes his own injuries is not a proper plaintiff under the statute. This is evidenced by the Wisconsin Supreme Court's acknowledgement of the Court of Appeal's withdrawal of dictum in conjunction with its *But see* citation to Doering v. WEA Ins. Group, 193 Wis. 2d 118, 532 N.W.2d 432 (1995). Miller v. Thomack, 210 Wis. 2d 650, 661, n. 11, 563 N.W.2d 891(1997).

Stat. § 125.035 (4)(a). However, there is no statutory or common-law requirement that the "provider" of alcohol to an underage person must place the alcohol directly into the hands of the underage recipient in order to preserve immunity when that underage recipient later injures himself by virtue of his intoxication.

Drawing an analogy to Kwiatkowski, there is no question that Mary Anne, like providers Schmechel and Pedersen, provided alcohol to a minor and therefore could be a defendant in a suit brought by an injured third party. The only question presented on appeal is whether Craig qualifies as such an injured third party.

Contrary to the Court of Appeals' decision in this case, the answer to whether Craig qualifies as an injured third party does not turn on the literal numeric relationship between Mary Anne, Greg and Craig. Meier v. Champ's Sport Bar & Grill, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). Instead, the answer is found in the definition of "procure". The statutes do not define the word "procure" and the legislative history is silent. Miller v. Thomack, 210 Wis. 2d 650, 659, 563 N.W.2d 891 (1997). However, statutory language is to be construed in such a way as to effectuate the intent of the legislature. Id. One rule of construction is to assume that the legislature intended to use words and phrases according to their ordinary and accepted meanings. Id. To "procure" means

"1a(1) to get by possession: obtain, acquire.." Id. *citing* Miller v. Thomack, 204 Wis. 2d 242, 258, 555 N.W.2d 130 (Ct. App. 1996); Webster's Third New International Dictionary (1976). Although Wis. Stat. § 125.035(2) and (4)(a) focus on procuring alcohol for another person, clearly established case law recognizes that it is possible to "procure" alcohol for oneself. Id.

Upon review of this Complaint, using the statutory definition for "provider" and this Court's definition of "procure", it is clear that Craig Anderson procured alcohol for himself directly and/or indirectly from the provider (Mary Anne), consumed the alcohol, and subsequently injured himself. Under Kwiatkowski, Craig is not an "injured third party". As such, his survivors are not proper plaintiffs.

The Court of Appeals' 1990 Kwiatkowski analysis in this regard received the approval of the Wisconsin Supreme Court in Doering v. WEA Ins. Group, 193 Wis. 2d 118, 142-43, 532 N.W.2d 432 (1995). In Doering, the Court, in sending a clear signal of approval to the Court of Appeals, absolutely barred this plaintiff's case when it observed that "sec. 125.035 **does not allow underage drinkers who themselves are injured to bring a cause of action** against the person who provided the alcohol beverages..." Id.

Similarly, in Meier v. Champ's Sport Bar & Grill, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94 (2001), the Wisconsin Supreme Court again addressed the issue of who may be a

plaintiff when it held that a person who procures alcohol for an underage person is not an injured "third party" entitled to take advantage of the immunity exception of § 125.035 (4)(b) when the intoxicated minor subsequently injures the provider.

In Meier, Adam Augustine, age 19, Jason Meier, age 19, and Bryan Johnson, age 21, took turns getting rounds of drinks from the bar at Champ's Sport Bar & Grill. Id. at ¶¶ 3, 6, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). All three were intoxicated when they left the bar together. Id. at ¶ 7, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). Augustine later lost control of the vehicle he was driving and the passenger, Meier, was seriously injured. Id. at ¶ 8, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). Meier commenced suit against Champ's Bar & Grill and Augustine. The circuit court held that because Meier was a provider of alcohol to Augustine, he was not entitled to the immunity exception. The Wisconsin Supreme Court, on a Petition to Bypass the Court of Appeals, agreed.

Of most significance to the case at hand is the Supreme Court's refusal to declare Meier a third party even to those transactions in which Meier did not purchase or physically obtain the alcohol, stating "we will not subdivide and nuance an evening of drinking into a dozen or so individual transactions". Id. at ¶.39, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). In specifically rejecting the methodology the Court

of Appeals used in the present case, the Court stated: "[T]he transactional focus of § 125.035 (4)(b) is the *provision* of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers." Id. at ¶ 24, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). The Court further stated: "Thus, application of this common definition of third party to § 125.035 (4)(b) leads to the conclusion that a third party is someone other than the underage drinker..." Id.

The Meier case is directly on point here in that an adult underage person (Craig) procured (provided, possessed, obtained, or acquired) alcohol for himself. The alcohol he procured for himself directly caused his injury. As a "provider" of alcohol to the underage consumer who caused his injury (himself), he is not an eligible plaintiff.

Neither statute nor applicable case law require that the alcohol be placed directly into the hand of each individual underage consumer. Immunity applies to any person who "sells, dispenses or gives away alcohol beverages to an underage person" unless the alcohol provided was a "substantial factor in causing injury to a third party". Wis. Stat. § 125.035 (2) and (4)(a)(b). There is no question in this case that Mary Anne Brasure is a provider of alcohol to an underage person (Greg and Craig) and that Craig was an underage drinker. As such, Craig clearly is not an "injured third party". His survivors are not proper

plaintiffs and may not sustain a cause of action against the provider of alcohol in a situation such as this, where Craig's injury was solely caused by his own procurement and subsequent over-consumption of alcohol.

II. MILLER V. THOMACK, 204 Wis. 2d 242, 555 N.W.2d 130 (Ct. App. 1996), IS NOT APPLICABLE IN THIS CASE.

The Court of Appeals, disagreeing with the foregoing analysis and citing Miller v. Thomack, 204 Wis. 2d 242, 555 N.W.2d 130 (Ct. App. 1996), held that "[b]ecause Mary Anne provided alcohol to Gregory only, Craig was a third party to that transaction, and the alcohol was a substantial factor in Craig's death, Mary Anne is not immune from suit..."

The decision of the Court of Appeals clearly ignores the Complaint, the Supreme Court's interpretation of the word "procure", and the clearly established precedent of Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990) and its progeny. Further, the Court of Appeals' decision in this case exaggerates its own holding in Miller and misstates the applicability of Miller to the present case.

In Miller v.Thomack, 204 Wis. 2d 242, 555 N.W.2d 130 (Ct. App. 1996), the Court of Appeals held that a minor consumer of alcohol may be an injured third party when the minor's injuries are caused by another intoxicated minor. We agree with this holding, insofar as it goes, but disagree with its applicability in this case.

In Miller, the plaintiff, Rhonda Miller solicited Brian Clary, who had attained the legal drinking age, to buy beer for herself and the defendants, Craig Thomack, Kimberly Ransom, Karen Miller and Jason Beattie, all of whom were underage. Id. at 250 and n. 5, 555 N.W.2d 130 (Ct. App. 1996). Kimberly Ransom, Karen Miller and Jason Beattie each contributed money towards the purchase of the alcohol. Id. at 250, 555 N.W.2d 130 (Ct. App. 1996). Later, while a passenger in the vehicle driven by the intoxicated Thomack, Rhonda Miller was injured. Id. at 251, 555 N.W.2d 130 (Ct. App. 1996). The question presented was whether contributing money towards the purchase of alcohol was sufficient to render the defendants "providers" of alcohol to a minor. Stated another way, were the financiers of the alcohol "providers" who could properly be defendants in the case? Obviously, that was a very different question than the one presented here.

Due to the question presented in Miller, however, the Court of Appeals rightfully focused on the actions of the defendants, holding that a person who contributes money towards the purchase of alcohol beverages for consumption by an underage person "procures" alcohol beverages for an underage person under the statute. Id. at 258, 555 N.W.2d 130 (Ct. App. 1996). Suit against a "provider" is not necessarily precluded by an injured third party simply because the third party may also have been drinking.

This holding recognizes only the obvious: that "providers" of alcohol to underage consumers are proper defendants. It does not, however, overrule controlling precedent first articulated in Kwiatkowski as to who is a proper plaintiff. Specifically, Miller fails to address whether Rhonda Miller's own actions of procuring alcohol, by soliciting Brian Clary to purchase the alcohol for the minor consumer, Thomack, was a cause of her own injury. More importantly, Miller does not endorse a cause of action in a case such as this one, when an underage adult's own over-consumption of alcohol directly causes injury to himself.

While the Wisconsin Supreme Court affirmed the Court of Appeals' limited holding in Miller, the Supreme Court did identify and articulate two concerns critical to the inquiry in this case:

> Another question may be whether the injured party, the plaintiff here, is a "3rd party" under § 125.035 (4)(b). The defendants did not seek review on or fully argue this question. Accordingly, we decline to address: (1) whether a person who participates in the procuring for an underage person may be a third party so as to be able to allege a violation of § 125.07 (1)(a); and (2) whether an underage person who consumes alcohol may be a third party so as to take advantage of the immunity exception of § 125.035 (4)(b).

Miller v. Thomack, 210 Wis. 2d 650, 660-61, n.11, 563 N.W.2d 891 (1997)

Because the issue of who may be a proper plaintiff was ignored in the Court of Appeals and specifically left open by the Wisconsin Supreme Court in the Miller cases, the

Miller cases are not applicable to the present case because the specific question presented here is not who may be a defendant, but rather, who is a proper plaintiff.

III. THE COURT OF APPEALS' TRANSACTIONAL FOCUS AND METHODOLOGY RESULTS IN A DECISION THAT CONTRADICTS THE LEGISLATIVE INTENT OF WIS. STAT. § 125.035.

For the first time, the Court of Appeals applied a transactional focus and methodology not previously encountered in Wis. Stat. § 125.035 cases by severing the entirety of the events into separable transactions. There are two primary deficiencies with this analysis.

The first deficiency with the Court of Appeals' transactional focus and methodology is that it is based on the false premise that Mary Anne Brasure provided alcohol only to Greg Brasure. The Court of Appeals failed to consider that Craig "procured" and consumed the alcohol, causing his own injury. As discussed above, this conclusion overlooks the statutory definition of "provide", the Court's broad definition of "procure", and the Complaint filed in this matter. This is especially true given this Court's refusal to apply the term "third party" literally to describe the numeric relationship among the actors. Meier, 2001 WI 20 at ¶ 22, 241 Wis. 2d 605, 623 N.W.2d 94 (2001).

The second deficiency with the Court of Appeals' transactional focus and methodology is that the focus and methodology themselves create a result contrary to the clear legislative policy of Wis. Stat. § 125.035. For decades,

Wisconsin common law recognized no liability on the part of sellers of alcohol for damages arising from the acts of an intoxicated person. Id. at ¶ 31, 241 Wis. 2d 605, 623 N.W.2d 94 (2001) *citing* e.g. Farmer's Mut. Auto. Cas. Co. v. Gast, 17 Wis.2d 344, 117 N.W.2d 347 (1962); Seibel v. Leach, 233 Wis. 66, 228 N.W. 774 (1939).

In 1985, the Wisconsin legislature created Wis. Stat. § 125.035. The legislature solidified provider immunity as the general rule in Wis. Stat. § 125.035 (2), and also signaled its approval of two Supreme Court cases which allowed provider liability when intoxicated minors had caused injury to third parties in Wis. Stat. § 125.035 (4)(b). *See* Sorenson v. Jarvis, 119 Wis.2d 627, 350 N.W.2d 108 (1984) and Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

The statute, however, did not intend to permit provider liability when an intoxicated minor injured himself, as "statutes must be interpreted so as to avoid absurd or unreasonable results." Sturgis v. Neenah Bd. Of Canvassers, 153 Wis. 2d 193, 198, 450 N.W.2d 481, 483 (Ct. App. 1989). In Doering v. WEA Insurance Group, 193 Wis. 2d 118, 532 N.W.2d 432 (1995), this Court explained that the legislative policy precludes an injured underage drinker from bringing a cause of action against the provider of alcohol, and further described how Wis. Stat. § 125.035 (4)(b) nevertheless

protects underage persons by deterring those who would provide them alcohol. The Court said:

> The fact that *sec. 125.035 does not allow underage drinkers who themselves are injured to bring a cause of action against the person who provided the alcohol beverages* does not defeat the conjectured legislative purpose of protecting underage persons. Facilitating compensation for injured underage drinkers is not the only means of attempting to protect people under the legal drinking age. The legislature may have determined that sheltering people under the legal drinking age by deterring those who might otherwise furnish alcohol beverages to them, rather than compensating the injured underage person, would better serve the goal of protecting young people.

Meier, 2001 WI 20 at ¶ 26, 241 Wis. 2d 605, 623 N.W.2d 94 (2001) (emphasis added) *citing with approval* Doering v. WEA Insurance Group (citation omitted).

Clearly, the Court of Appeals' methodology does not comport with the legislative policy of deterring "those who would otherwise furnish alcohol beverages to underage persons". In fact, the message sent by the Court of Appeals in this case directly contradicts legislative policy. To illustrate the untenable implication of the Court of Appeals' decision, consider the following: A parent who wishes to escape civil liability should still enable minor consumption of alcohol by standing at the quarter-barrel and personally dispensing beer directly into the hands of each and every eager minor who attends his or her child's high school graduation party. If the parent does this, he or she will not be civilly liable to any of the intoxicated minors for injuries they may cause to themselves. Heaven forbid if one of the minors walks away with two beers, giving one to a

friend who later kills himself in an auto accident; liability would ensue. The Wisconsin Legislature could not have intended to encourage such behavior under Wis. Stat. § 125.035 on one hand while criminalizing the same behavior under Wis. Stat. § 125.07[4] on the other.

CONCLUSION

The Court of Appeals' decision in this case is in irreconcilable conflict with the statutory definition of "provider", the Supreme Court's interpretation of the word "procure", and the clearly established precedent of Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 774-75, 461 N.W.2d 150 (Ct. App. 1990), Doering v. WEA Ins. Group, 193 Wis. 2d 118, 142-43, 532 N.W.2d 432 (1995), and Meier v. Champ's Sport Bar & Grill, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94 (2001).

Further, the Court of Appeals' decision in this case extends its holding in Miller beyond the issues raised and resolved, despite the clear message from the Wisconsin Supreme Court that its decision was not conclusive on a variety of issues in Miller v. Thomack, 204 Wis. 2d 242, 555 N.W.2d 130 (Ct. App. 1996) *affirmed but questioned at* Miller v. Thomack, 210 Wis. 2d 650, 660-61, n.11, 563 N.W.2d 891 (1997).

[4] Wis. Stat. §125.07 provides certain criminal penalties for those who provide alcohol to underage persons.

Additionally, the Court of Appeals' transactional focus and methodology was specifically rejected by the Wisconsin Supreme Court in Meier v. Champ's Sport Bar & Grill, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94 (2001) in which the Court stated: "[T]he transactional focus of § 125.035 (4)(b) is the *provision* of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers." Id. at ¶ 24, 241 Wis. 2d 605, 623 N.W.2d 94 (2001). The transactional focus and methodology used by the Court of Appeals makes an ill-advised end run around the ultimate conclusion reached by the Wisconsin Supreme Court when it declared, "Thus, application of this common definition of third party to § 125.035 (4)(b) leads to the conclusion that a third party is someone other than the underage drinker..." Id.

Finally, the Court of Appeals' decision here is contrary to legislative policy as articulated in Doering v. WEA Insurance Group, 193 Wis. 2d 118, 532 N.W.2d 432 (1995), where this Court declared that legislative policy precludes an injured underage drinker from bringing a cause of action against the provider of alcohol.

Accordingly, the Defendant-Respondent-Petitioner, Mary Anne Brasure, respectfully requests that this Court reverse the decision of the Court of Appeals and reinstate summary judgment in her favor as ordered by the trial court on March 11, 2002.

Dated this 21st day of May, 2003.

DENISSEN, KRANZUSH, MAHONEY & EWALD, S.C.

By: 

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CERTIFICATION

I hereby certify that the Brief and Appendix of Defendant-Respondent-Petitioner, Mary Anne Brasure, conforms to the rules contained in Wis. Stat. § 809.19 (8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of the Brief and Appendix of Defendant-Respondent-Petitioner, Mary Anne Brasure, is 19 pages and constitutes 4,119 words, exclusive of the cover sheet, Table of Contents, Table of Authorities, and Appendix.

Dated at Green Bay, Wisconsin this 21st day of May, 2003.

DENISSEN, KRANZUSH, MAHONEY & EWALD, S.C.

By: _____

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APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0980

Cir. Ct. No. 01-CV-77

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

MARK ANDERSON AND JANET ANDERSON, HIS WIFE,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, MARY ANNE BRASURE AND GREGORY L. BRASURE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Mark and Janet Anderson appeal a summary judgment finding that Mary Anne Brasure and her son Gregory Brasure are

immune from civil liability under WIS. STAT. § 125.035[1] for providing the Andersons' underage son, Craig, with alcohol. The Andersons also appeal the portion of the judgment that found Gregory was not covered by his father's insurance policy issued by American Family Mutual Insurance Company. While we agree with the trial court that Gregory was immune from suit and not covered by the insurance policy, Mary Anne is not immune from suit. Thus, we affirm the judgment in part, reverse it in part, and remand for further proceedings.

Background

¶2 On or about March 19, 1999, Mary Anne purchased a bottle of vodka for Gregory, who was not yet twenty-one years old. She left it for him along with a note that said, "Greg, you owe me $12.00." Gregory, Craig, and Robert Tripp went to vacation property owned by Mary Anne and her husband, Garth. Gregory, Craig, and Robert drank Gregory's vodka. Tragically, Craig died either late that day or early the next day while at the vacation property with Gregory, and the coroner attributed his death to acute alcohol intoxication. Additional facts will be added to the discussion when relevant.[2]

¶3 The Andersons brought a claim for Craig's wrongful death against Mary Anne, Gregory, and the Brasures' insurer, American Family. Mary Anne

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The Brasures apparently told the Andersons that Mary Anne and Gregory were likely to assert their Fifth Amendment rights against self-incrimination at any deposition. We include this information solely for the purpose of explaining our unusually abbreviated factual recitation. For purposes of their summary judgment motions, both Brasures conceded the facts as alleged in the complaint were true. American Family also premised its motion on the facts as alleged in the complaint.

and Gregory moved for summary judgment on the basis of WIS. STAT. § 125.035(2), which provides immunity from civil liability arising from providing alcoholic beverages to another. American Family moved for summary judgment on the basis of specific exclusions in its policy. The trial court entered a judgment that (1) granted summary judgment finding Mary Anne immune, dismissing claims against her and American Family; (2) granted summary judgment finding Gregory immune, dismissing claims against him and American Family; (3) granted summary judgment finding that American Family's policy did not cover Gregory; and (4) denied summary judgment regarding American Family's coverage of Mary Anne, stating that there were genuine issues of material fact regarding her coverage.[3] The Andersons now appeal the three parts of the motion that were granted.

Discussion

¶4 We review summary judgments de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk,*** 2001 WI 25, ¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Interpretation of a statute is a question of law we review de novo. ***Kwiatkowski v. Capitol Indem. Corp.***, 157 Wis. 2d 768, 774-75, 461 N.W.2d 150 (Ct. App. 1990).

[3] Parts (3) and (4) apply, according to the court, in the event that the underlying actions against Gregory and Mary Anne respectively are reinstated by further ruling of the trial court or on appeal. The Andersons did not appeal part (4); however, American Family seeks reversal of this part in its response. We will not consider American Family's challenge to part (4) because American Family failed to file a cross-appeal to preserve its rights. *See* WIS. STAT. § 809.10(2)(b) (a respondent who seeks modification of the judgment appealed from in the same action shall file a notice of cross-appeal).

¶5 WISCONSIN STAT. § 125.035 provides in part:

> (2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.
>
> ....
>
> (4) ...
>
> (b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a *substantial factor in causing injury to a 3rd party.* (Emphasis added.)

Mary Anne's Immunity

¶6 Mary Anne argues that she is immune as a provider under WIS. STAT. § 125.035(2) because Craig was not a third party as contemplated in § 125.035(4)(b). She relies, as did the trial court, on ***Kwiatkowski***. Relying on ***Kwiatkowski***, Mary Anne argues:

> 1. An underage drinker who does nothing but drink (e.g., provides only to himself) is not a "third party" and thus cannot take advantage of the nonliability exception to sue those who provided to him;
>
> 2. An alcohol provider cannot be sued by the underage drinker when the underage drinker hurts himself after drinking too much; and
>
> 3. It does not matter whether the alcohol provider gave the alcohol directly to the injured underage drinker, or provided it to another person who in turn provided it to the injured underage drinker: there is no cause of action against either provider.

Mary Anne's reliance on and interpretation of ***Kwiatkowski*** is only partially accurate.

¶7 Kwiatkowski, an underage drinker, and his companion, Pederson, were at a bar owned by Schmechel. ***Id.*** at 771. The bartenders—Schmechel's employees—served Kwiatkowski directly. ***Id.*** They also served Pederson, who brought drinks to Kwiatkowski. ***Id.*** At the end of the evening, Kwiatkowski and Pederson got into a vehicle operated by Kwiatkowski and were involved in an accident. ***Id.*** Both were injured. Kwiatkowski alleged negligence per se by Pederson and Schmechel for providing alcohol to a minor, ***id.*** at 771-72, but the case was dismissed after the trial court determined the immunity exception did not apply. ***Id.*** at 774. We affirmed the trial court. ***Id.*** at 777.

¶8 Mary Anne analogizes herself to Schmechel, Gregory to Pederson, and Craig to Kwiatkowski. In ***Kwiatkowski***, however, the question was whether the statute placed limitations on who could be plaintiff. We upheld the trial court's conclusion that the provider's immunity is lost only when the injured third party is a claimant, not when the consumer of alcohol is the claimant. ***Id.*** In ***Kwiatkowski***, *both* Schmechel and Pederson provided alcohol directly to Kwiatkowski. In other words, Kwiatkowski could not be considered a third party as contemplated by WIS. STAT. § 125.035(4)(b).

¶9 In the present case, Mary Anne did not directly provide Craig with alcohol. For her to accurately analogize her case to ***Kwiatkowski***, Schmechel could only have served Pederson. Schmechel, however, also served Kwiatkowski. ***Id.*** at 771. This is why Mary Anne's third contention about ***Kwiatkowski***, that it does not matter to whom the provider gave alcohol, is inaccurate.

¶10 Mary Anne's second argument about ***Kwiatkowski*** seemingly ignores ***Miller v. Thomack***, 204 Wis. 2d 242, 264, 555 N.W.2d 130 (Ct. App. 1996), in which we stated:

> We cannot say that it is clear that the legislature intended that a person who provides alcohol to an underage person ... is immune from liability in a suit by [a] third party solely because that third party ... illegally consumed alcohol.

Mary Anne's second contention, that an underage drinker cannot sue the provider when the drinker hurts himself, is true in the case where there is only a first party (the provider) and a second party (the drinker).[4] *See* ***Meier v. Champ's Bar & Grill***, 2001 WI 20, ¶24, 241 Wis. 2d 605, 623 N.W.2d 94. However, ***Miller*** says that suit is not precluded by an injured third party simply because the third party may also have been drinking.[5] ***Miller***, 204 Wis. 2d at 264. Thus, the Andersons' suit is not automatically preempted as Mary Anne claims.

¶11 Mary Anne also ignores the most recent case law to apply WIS. STAT. § 125.035, ***Meier***, which points out at ¶24:

> [T]he *transactional focus* of § 125.035(4)(b) is the *provision* of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers. When the transaction between these principals is a substantial factor in causing harm to a third party the statutory immunity is lifted and a third party may proceed against a provider. (Emphasis added; footnote omitted.)

In this case, there are two transactions. In the first transaction, Mary Anne provided the alcohol to Gregory. In the second transaction, Gregory provided the

---

[4] This is the extent to which Mary Anne's first contention about ***Kwiatkowski*** applies. *See* ***Kwiatkowski v. Capitol Indem. Corp.***, 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990).

[5] This holding is consistent with the plain language of WIS. STAT. § 125.035(4)(b). Its focus is on the alcohol *provided* as a substantial factor in causing the third party's injury.

alcohol to Craig.[6] The transactions are separated by time, location, and participants.[7]

¶12 When Mary Anne purchased the vodka for Gregory, Craig was not present. Nothing indicates, and indeed neither Mary Anne nor Gregory suggests, that Craig asked for the liquor, paid for the liquor, or was present for or aware of its purchase.[8] Nothing suggests Mary Anne knew Gregory would give the vodka to others. Mary Anne was not present when the alcohol was shared; only Gregory, Craig, and Robert were at the vacation property. Because Mary Anne provided alcohol to Gregory only, Craig was a third party to that transaction, and the alcohol was a substantial factor in Craig's death, Mary Anne is not immune from suit under WIS. STAT. 125.035(2).

Gregory's Immunity

¶13 Gregory provided alcohol directly to Craig. For that reason, Gregory is covered under WIS. STAT. § 125.035(2), which provides immunity when giving alcoholic beverages to another person. The Andersons, however, argue that Gregory was negligent in other ways such that § 125.035(2) is inapplicable. The Andersons allege that Gregory intentionally tried to get Craig drunk and that immunity is lost pursuant to § 125.035(3).[9] The Andersons also

[6] It is undisputed that the alcohol was at least a "substantial factor" in Craig's death.

[7] We do not necessarily intend to prescribe these distinctions as a rigid formula for determining when or whether separate transactions occur.

[8] The Andersons originally pled that Mary Anne gave the alcohol to Gregory or Craig, but later conceded that nothing supported the argument she supplied directly to Craig.

[9] WISCONSIN STAT. § 125.035(3) states that the immunity of § 125.035(2) does not apply if the provider of alcoholic beverages "causes their consumption by force or by representing that the beverages contain no alcohol."

allege Gregory was negligent by failing to supervise Craig's consumption of alcohol, failing to stop serving Craig the alcohol once it was apparent he was intoxicated, failing to obtain medical assistance, and other actions or inactions. The Andersons' arguments are unavailing.

¶14 To prevail on their argument that Gregory acted contrary to WIS. STAT. § 125.035(3) and is thus stripped of immunity, the Andersons must be able to show that Gregory either lied to Craig about the alcoholic content of the drinks Gregory was providing, or they must be able to show that Gregory forced Craig to consume the alcohol. Intent to cause intoxication is irrelevant because it is not mentioned in the statute. While Gregory may have in fact intended that Craig become intoxicated, nothing in the record supports the contention that this was achieved through deceit or force as required by the plain statutory language.

¶15 The Andersons argue that the best way for Gregory to accomplish his posited objective would be by "telling Craig Anderson that the beverage contained no alcohol, or misleading Craig Anderson about the amount of vodka in the drinks" Gregory served. This argument assumes speculative facts. The only evidence the Andersons direct us to is an affidavit their attorney submitted in which the attorney avers that "in a written statement attached to the police report, Gregory Brasure said he helped Craig Anderson from the toilet to the bed and that he poured some Sunny Delight [a nonalcoholic drink] in one of Craig Anderson's drinks without alcohol." The Andersons also claim that the police report states Gregory was mixing the drinks. The Andersons believe this evidence indicates Gregory may have lied about the alcoholic content of the drinks he served to Craig.

¶16 This evidence fails to support the Andersons' argument. At best, this evidence indicates that Craig had at least one drink that did not contain alcohol. Indeed, had Gregory been lying about the alcoholic content of the drinks he was mixing, one might suspect the Sunny Delight glass would have contained some amount of alcohol. Nothing was pled, nor was any evidence presented, that would indicate Gregory was deceitful about the amount of alcohol in the drinks he provided.[10]

¶17 There is also nothing pled or presented that would suggest Gregory forced Craig to drink the alcohol. Robert Tripp submitted an affidavit in which he stated that all three men voluntarily consumed the alcohol. The Andersons argue that Robert was not at the vacation home all night and therefore could not know what happened at other times, but this provides no support for their claim that Gregory forced Craig's consumption.

¶18 The Andersons' deceit and force argument is premised on mere speculation. Gregory's refusal to be deposed does nothing to change this. The Andersons have failed to make a prima facie case for deceit or force, and Gregory's supposedly intentional acts are not necessarily synonymous with deceitful or forceful ones.

¶19 Gregory's alleged failures to supervise Craig's consumption of vodka and to stop serving him once it was apparent he was intoxicated cannot be separated from the "transactional focus" of WIS. STAT. § 125.035. They cannot

[10] The Andersons also claim that Gregory's refusal to be deposed creates genuine issues of material facts. However, we reject this claim. *See* ¶18, *infra*.

give rise to a separate cause of action because they are necessarily part of Gregory's provision of the vodka.

¶20 As for Gregory's other actions or inactions, the "basic principle of duty in Wisconsin is that a duty exists when a person fails to exercise reasonable care—when it is foreseeable that a person's act or omission may cause harm to someone."[11] *See* ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶23, 251 Wis. 2d 171, 641 N.W.2d 158. Both Gregory and Craig were at least eighteen at the time—neither was a minor so neither had any heightened duty to supervise the other. Unlike ***Stephenson***, where a man was exposed to liability for offering to drive his drunk co-worker home then failing to do so, nothing suggests Gregory took on any special duty.[12] In short, nothing in the record suggests Gregory had affirmatively assumed a particular duty of care toward Craig.

¶21 In their brief, however, the Andersons argue Gregory was negligent by moving Craig's body once he was unconscious. They argue that once Gregory took the action of moving Craig, he had a duty of reasonable care. *See* ***id.*** Once he assumed that duty, the Andersons contend that Gregory should have called for medical assistance and was negligent by not doing so. Additionally, the coroner noted some abrasions on Craig's body and a small abrasion on his head. The Andersons argue this shows negligence by Gregory.

---

[11] Of course, WIS. STAT. § 125.035 provides an exception to this general rule for the act of providing alcohol to others.

[12] The supreme court said the defendant in ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶24-25, 251 Wis. 2d 171, 641 N.W.2d 158, could be liable based on his affirmative assumption of responsibility for the co-worker, but that he was absolved of liability because of WIS. STAT. § 125.035.

¶22 First, nothing in the record suggests that Gregory knew Craig's situation was so serious as to require medical attention. Second, the toxicology report showed Craig's blood ethanol concentration was .374% and the urine test showed a concentration of .402%. The coroner attributed death to acute alcohol intoxication, not to any of the abrasions. The Andersons fail to show how, as a matter of law, Gregory moving Craig's body was negligent or otherwise a breach of some duty when nothing suggests moving Craig's body contributed to his death.

Insurance Coverage[13]

¶23 The interpretation of an insurance contract and the conclusion as to whether coverage exists under a given contract are questions of law we review independently. ***Ledman v. State Farm Mut. Auto. Ins. Co.***, 230 Wis. 2d 56, 61, 601 N.W.2d 312 (Ct. App. 1999). Assuming Gregory is not immune, the Andersons claim that Gregory should be covered under his father's insurance policy. American Family claims that two exceptions preclude coverage.

¶24 The relevant exceptions state:

> 8. **Illegal Consumption of Alcohol.** We will not cover **bodily injury** or **property damage** arising out of the **insured's** knowingly permitting or failing to take action to prevent the illegal consumption of alcohol beverages by an underage person.
>
> ....
>
> 10. **Intentional Injury.** We will not cover **bodily injury** or **property damage** caused intentionally by or at the

[13] Our affirmance of Gregory's immunity should render the coverage issue moot. We nonetheless choose to address the coverage question to provide American Family with a disposition that is not contingent upon Gregory's statutory immunity.

> direction of any **insured** even if the actual **bodily injury** or **property damage** is different than that which was expected or intended from the standpoint of any **insured**.

¶25 Exclusion 8 is sufficient to preclude coverage for Gregory. It is undisputed that Gregory knew Craig was underage and that Gregory did nothing to prevent Craig from drinking the vodka. Craig's death resulted solely from the alcohol that Gregory knowingly permitted Craig to drink. Even if we were to conclude that the Andersons' "other actions or inactions" argument had merit, coverage would still be precluded under exclusion 8. We note additionally that assuming the Andersons are correct that Gregory's intention was that Craig become inebriated, coverage would also be precluded by exclusion 10.

Summary

¶26 The portions of the summary judgment finding Gregory immune under WIS. STAT. § 125.035 and dismissing him and confirming the American Family policy does not cover him are affirmed. The portion of the summary judgment finding Mary Anne immune under the statute is reversed. The remainder of the order was not appealed.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

Recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | MARINETTE COUNTY

MARK ANDERSON and
JANET ANDERSON, his wife,

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY
and
MARY ANNE BRASURE
and
GREGORY L. BRASURE,

Defendants.

Case No. 01-CV-77

Case Code: 30105

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND/OR DECLARATORY JUDGMENT

Motions for Summary Judgment having been filed with the court on or about October 25, 2001, by the defendant, Mary Anne Brasure, the defendant, Gregory L. Brasure, and the defendant, American Family Mutual Insurance Company, along with supporting Affidavits and Briefs; and

The plaintiffs, Mark Anderson and Janet Anderson, having filed a Brief and Affidavit Opposing Said Motions; and

Said defendants having filed Reply Briefs and Reply Affidavit; and

The Motions having come before the Court for hearing on February 18, 2002, with the plaintiffs having appeared by their attorney, Frank Kowalkowski, the defendant, Mary Anne Brasure, having appeared by her attorney, Mark Pennow, the defendant Greg Brasure, having

appeared by his attorney, Sandra L. Hupfer, and the defendant, American Family Mutual Insurance Company, having appeared by one of its attorneys, Joe Derocher; and

The Court, having considered the Briefs and Affidavits filed by all parties, and having heard arguments of counsel, makes the following Order:

IT IS HEREBY ORDERED that the defendant, Mary Anne Brasure's Motion for Summary Judgment, pursuant to sec. 802.08, Wis. Stats., is granted, and that the defendants, Mary Anne Brasure, and her insurance company, American Family Mutual Insurance Company are hereby dismissed from the above-captioned action, with prejudice; and

IT IS HEREBY ORDERED that the defendant, Gregory L. Brasure's Motion for Summary Judgment pursuant to sec. 802.08, Wis. Stats., is hereby granted and that the defendant, Gregory L. Brasure, and his insurance company, American Family Mutual Insurance Company, are hereby dismissed from the above-captioned action, with prejudice; and

IT IS FURTHER ORDERED that if upon appeal or further ruling of the Court, the underlying action against Gregory L. Brasure is not dismissed, then and in that event, there is no insurance coverage for the allegations against Gregory L. Brasure as set forth in the plaintiffs' Complaint, and that American Family Mutual Insurance Company's Motion for Summary Judgment pursuant to sec. 802.08 is hereby granted and that American Family Mutual Insurance Company is dismissed from the above-captioned action, with prejudice, and is further relieved from any and all duty to defend or indemnify the defendant, Gregory L. Brasure, from any claims arising out of the above-entitled action; as to American Family Mutual Insurance Company's Summary Judgment Motion regarding Mary Anne Brasure, the Court further ruled that if upon appeal or further ruling of the Court, the underlying action against Mary Anne Brasure is not dismissed, then and in that event, based on the record before the Court at this time,

there are genuine issues of material fact and American Family Mutual Insurance Company's Motion for Summary Judgment as to coverage regarding Mary Anne Brasure, would be denied.

Dated at Marinette, Wisconsin this 11th day of March, 2002.

Honorable Tim A. Duket
Circuit Court Judge, Branch 2

COPY

STATE OF WISCONSIN | CIRCUIT COURT BRANCH NO. _____ | MARINETTE COUNTY

MARK ANDERSON and
JANET ANDERSON, his wife
1248 Garfield Street
Niagara, WI 54151

Plaintiffs,

vs.

ABC INSURANCE COMPANY
A Fictitious Insurance Company
and
MARY ANNE BRASURE
284 Hoover Avenue
Niagara, WI 54151
and
GREGORY L. BRASURE
284 Hoover Avenue
Niagara, WI 54151

Defendants.

Case NO. 01-CV-77

Code No. 30105 - Wrongful Death

AUTHENTICATED COPY
LINDA L. DUMKE

MAR 19 2001

CLERK OF COURTS
MARINETTE COUNTY, WI

COMPLAINT

COME NOW the plaintiffs, Mark and Janet Anderson, by their attorneys, Wanezek, Umentum & Jaekels, S.C., by Frank W. Kowalkowski, and as and for a Complaint, allege and state to the Court as follows:

1. That the plaintiff, Mark A. Anderson, is an adult resident of the State of Wisconsin, who maintains a residence at 1248 Garfield Street, Niagara, WI 54151, and who was the father of Craig P. Anderson.

2. That the plaintiff, Janet Anderson, is an adult resident of the State of Wisconsin, who maintains a residence at 1248 Garfield Street, Niagara, WI 54151, and who was the mother of Craig P. Anderson.

3. That the defendant, Mary Anne Brasure, is an adult resident of the State of Wisconsin,

whose last known address was 284 Hoover Avenue, Niagara, WI 54151.

4. That the defendant, Gregory Brasure, is an adult resident of the State of Wisconsin, whose last known address was 284 Hoover Avenue, Niagara, WI 54151.

5. That, upon information and belief, the defendant, ABC Insurance Company, provided insurance to the defendants, Mary Anne Brasure and Gregory Brasure. That, upon information and belief, the policy(s) issued by ABC Insurance Company to the defendants, included a homeowner's policy and insured the defendants, by law, for damages caused by their negligent act or acts. Therefore, ABC Insurance Company is a proper party defendant to this action.

6. Craig P. Anderson died on or about March 20, 1999, at a property owned in whole or in part by the defendants located at N21080 County Highway O, in the Town of Niagara, Wisconsin. Upon information and belief, Craig P. Anderson died as a result of ingesting alcohol provided to him by the defendants.

7. At the time of Craig P. Anderson's death, he was under the legal drinking age and not allowed to purchase alcoholic beverages.

8. On or about March 19, 1999, the defendant, Mary Anne Brasure, purchased a 1.75 liter bottle of vodka which she provided to the defendant, Gregory Brasure and/or Craig P. Anderson.

9. The defendant, Mary Anne Brasure, left a note, along with the vodka, which stated as follows: "Greg, you owe me $12.00."

10. Upon information and belief, the alcohol which was consumed by Craig P. Anderson was the vodka purchased by Mary Anne Brasure.

11. Mary Anne Brasure's purchase of the alcohol and her providing it to people under the legal drinking age, was in violation of Wis. Stats. sec. 125.07 and constitutes negligence

per se.

12. Gregory Brasure's providing of alcohol to Craig P. Anderson who was under the legal drinking age was in violation of Wis. Stats. sec. 125.07 and constitutes negligence per se.

13. The negligence of Mary Anne Brasure was the proximate cause of the death of Craig P. Anderson.

14. The negligence of Gregory Brasure was the proximate cause of the death of Craig P. Anderson.

15. Mary Anne Brasure was, among other things, negligent in providing alcohol to people under the legal drinking age, allowing individuals under the legal drinking age to leave their home with the alcohol she purchased, failing to supervise the consumption of the alcohol and other actions or inactions, all of which contributed to the death of Craig T. Anderson.

16. Gregory Brasure was, among other things, negligent in providing alcohol to people under the legal drinking age, allowing Craig Anderson who was under the legal drinking age to leave his home with the alcohol purchased by Mary Anne Brasure, failing to supervise the consumption of the alcohol, failing to stop serving Craig T. Anderson once it became apparent he was intoxicated, failing to obtain assistance for Craig T. Anderson once it became apparent he was intoxicated to the extent that care was needed, and other actions or inactions, all of which contributed to the death of Craig T. Anderson.

17. Upon information and belief, the defendant, Gregory Brasure intentionally tried to get Craig T. Anderson to become excessively intoxicated.

18. Upon information and belief, the actions of Gregory Brasure in providing excessive amounts of alcohol to Craig T. Anderson was intentional, with wilful, wanton and reckless

disregard for the safety of Craig T. Anderson.

19. Upon information and belief, the providing of alcohol by Gregory Brasure to Craig T. Anderson was done with the intent to cause some degree of harm to Craig T. Anderson and was done with wilful, wanton and reckless disregard for the safety of Craig T. Anderson.

WHEREFORE, these plaintiffs demand judgment against the defendants, and each of them, as follows:

A. For a monetary judgment against each of the named defendants, and their respective insurance carriers, for an amount to be determined by a jury of twelve (12) persons.

B. For costs, disbursements and reasonable attorney fees incurred in this action;

C. For punitive damages against the defendant, Gregory Brasure; and

D. For such other and further relief as the Court may deem just and equitable.

PLAINTIFFS REQUEST A 12-PERSON JURY.

Dated this 16 day of March, 2001.

WANEZEK, UMENTUM & JAEKELS, S.C.

By: _____
Frank W. Kowalkowski
Attorney for Plaintiffs,
Mark and Janet Anderson

P.O. Address:
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P.O. Box 22250
Green Bay, WI 54305-2250
(920) 437-8191
#1018119

STATE OF WISCONSIN: CIRCUIT COURT: COUNTY OF MARINETTE

MARK ANDERSON and
JANET ANDERSON,

Plaintiffs,

-vs-

Case No. 01 CV 77
MOTION HEARING

ABC INSURANCE COMPANY
A Fictitious Insurance Company

and

MARY ANNE BRASURE and
GREGORY L. BRASURE,

Defendants.

HONORABLE TIM A. DUKET

Circuit Judge

February 18, 2002

Belinda Seefeldt, RPR

Official Court Reporter

COPY

APPEARANCES:
Attorney Frank Kowalkowski appearing on behalf of the Plaintiffs.

Plaintiffs Mark Anderson and Janet Anderson were present.

Attorney Joe Durocher appearing on behalf of American Family Insurance Company.

Attorney Mark Pennow appearing on behalf of Defendant Mary Anne Brasure.

Attorney Sandra Hupfer appearing on behalf of Gregory Brasure.

Defendants Mary Anne Brasure and Gregory Brasure were present.

PROCEEDINGS

THE COURT: Next we have Mark Anderson and Janet Anderson, his wife, plaintiffs, vs. American Family Mutual Insurance Company and Mary Anne Brasure and Gregory L. Brasure, this is file 1 CV 77. Frank Kowalkowski is here representing the plaintiffs, who are also here; Jeffrey DeMeuse is here representing American Family and also --

MR. DUROCHER: Your Honor, Joe Durocher for American Family.

THE COURT: Okay. Mark Pennow is here representing Mary Anne Brasure, and Gregory Brasure is represented by Sandra Hupfer.

The parties have submitted extensive briefs and reply briefs on the issue -- issue of various issues. The principal one is whether Greg Anderson, the deceased, is, in fact, a third party and can avail himself, or at least the plaintiffs who are the surviving parents who can avail themselves of the exception to immunity under 125.035; (2) is a general immunity provision given to those who furnish alcoholic beverages -- beverages to individuals. I think (4) (a) is the exception to that immunity.

MS. HUPFER: Or (b).

THE COURT: (4)-- (4) (a)? (b)?

MS. HUPFER: I think, Judge.

THE COURT: In the effect that alcohol is given to an underage person, and subsequently that person injures a third party, and alcohol was a significant factor in producing the injury.

There are a number of cases cited by the parties; the most recent and principal case being the Meier case, decided by the -- the Wisconsin Supreme Court on March 13, 2001, which coincidently was one week prior to the filing of this action, or at least days prior. The party also cites the key case of Miller. The Court has read the Court of Appeals case as well as the Supreme Court review of that case found at 210 Wis. 2d 650 a 1997 case. The Court of Appeals case of Miller found at 204 Wis. 2d 242 is a Court of Appeals (1996). The Court has looked at the Doering case 193 Wis. 2d at 118 (1995), and Paskiet 164 Wis. 2d 800 (1991), and perhaps what may be the most important case, the Kwiatkowski case found at 157 Wis. 2d 768 Court of Appeals from (1990).

I don't know to what extent the parties wish to offer additional argument or if they intend to rely based upon the written submissions. I guess I should maybe start with Mr. Kowalkowski first.

MR. KOWALKOWSKI: Well, Your Honor I would

like an opportunity to respond to the reply briefs.

THE COURT: Go ahead.

MR. KOWALKOWSKI: In Mary Anne's reply brief they obviously mentioned the Kwiatkowski case, but that is distinguishable from this case for the same reason Meier was distinguishable. In Kwiatkowski the plaintiff was trying to sue the very people who gave him the alcohol. In other words, there was no injured third party as in this case. The injured plaintiff was a second party or a person who got alcohol to -- directly from the defendant. That was not in the case between Craig and Mary Anne. There is no third party in the Kwiatkowski case because there is only two people involved in the action; the plaintiff and the plaintiff who got the alcohol directly from the defendant he was suing. As far as our claim against Mary Anne is concerned, that's not the same set of facts.

THE COURT: You don't even know whether Mary Anne Brasure gave the alcohol directly to Craig Anderson. You can't be sure of that.

MR. KOWALKOWSKI: It's our understanding from the police reports and the information we do have that Mary Anne gave it to Greg who in turn gave it to Craig. That's the best of our understanding; however, you are right to some extent because both of the defendants

absolutely refuse to be deposed, although that's what we gathered from the police record. I would admit we are not a hundred percent certain of that fact, as well as numerous other facts because the defendants won't let us depose them.

THE COURT: Your client says she gave it to her son and/or Craig Anderson.

MR. KOWALKOWSKI: And, Your Honor, again, that was pled that way simply because we realize there were some facts that were not known at that time. It is our belief, and according to police reports, it appears Mary Anne gave it only to Greg, and there was nothing in the defendants' briefs which would lead anyone to believe otherwise.

THE COURT: Well, you know, in this Meier case, Meier got severely injured, right? He was 19. Augustine was the person actually driving the car. He was 19 and there was this crash. Meier was severely injured, brain injury included, and the Wisconsin Supreme Court, as of 2001, says that Meier can't sue the driver because he was the provider of the alcohol, right?

MR. KOWALKOWSKI: Yes, and that's why we believe how this case is distinguishable. They have allegations here Craig wasn't the provider of alcohol to

anyone or himself.

THE COURT: What about the Miller case? She was 15 and Thomack, the other underage drinker, was 16. Thomack was the driver of the vehicle that had the crash, and Miller was injured and she wanted to sue Thomack and other people that had chipped in for the purchase of the alcohol. She was drinking with at least three other underage persons, including Thomack who had actually done the contributing for the acquisition of the alcohol by a person who was of age to purchase, and she could sue under the Court of Appeals decision at 204 Wis. 2d 242 because she wasn't a provider of the alcohol.

MR. KOWALKOWSKI: Correct, that's the case that's most analogous to what's before us today. She was absolutely an underage consumer of alcohol, just like Craig was, yet Miller at the Court of Appeals level said that's okay, she can still go ahead, and the -- the fact that Meier acknowledged the Miller decision, it basically indicated the decision Meier did not go. Contrary to the holding in Miller, Meier acknowledged the fact that in -- prior to the Meier, the issue wasn't whether or not the underage person was a consumer, the issue in Meier was whether or not the plaintiff was involved in obtaining and procuring the alcohol.

THE COURT: But the -- the key distinction in Miller is that even though Meier and Miller had been underage drinkers, they were injured by the driving of Augustine and Thomack, and those were, in fact, underage people that had been supplied alcohol, right?

MR. KOWALKOWSKI: True, which he has also brought a cause of action against the providers of the alcohol which is what we are doing in this case against Mary Anne specifically, as well as Greg, so they could have obviously asserted claims out -- outside the statute or negligence of the driver of the vehicle that injured them, but as far as the 125.035 issue is concerned, neither Meier nor Miller says you are out of the loop simply because you're an underage consumer. In fact, they say just the opposite, Miller alluding to in Meier. Meier said the fact or the holding in Miller was in no way contrary to the holding in Meier.

THE COURT: Because Miller was not a provider?

MR. KOWALKOWSKI: Correct.

THE COURT: And Meier was a provider?

MR. KOWALKOWSKI: Yes, Your Honor.

THE COURT: But they are not suing because they were the driver, they are suing because somebody else had provided Augustine and Thomack with alcohol and

they were the ones driving and were negligent and caused the accident.

MR. KOWALKOWSKI: Well, Meier, the plaintiffs sued the bar, Augustine and -- and another defendant as well. I mean, one of them happened to also be the driver, but all three were providers.

THE COURT: Well, you are not saying that Kwiatkowski or -- Kwiatkowski's not good law today, are you?

MR. KOWALKOWSKI: Well, obviously some of that case that -- at least the dictum relating to misinterpretations of 125.035 has been withdrawn, that portion of it. I do believe it is not good law, but the thing about Kwiatkowski is we have -- it's distinguishable for the same reason Meier is; plaintiff was not a third party is what they are trying to claim, but the alcohol went straight from the provider to the plaintiff in that case, which is, at least as far as Mary Anne is concerned, the alcohol never went directly from Mary Anne to Craig.

THE COURT: And so you are conceding, under Kwiatkowski at least, Gregory Brasure can get out because your theory of the case is that he delivered the vodka to Craig Anderson?

MR. KOWALKOWSKI: I think I will concede to

Kwiatkowski's case is more analogous more to the claims against Greg; however, I guess I don't concede that takes him out. There are other distinctions and factual issues relaying the statute as well as other claims of negligent and intentional acts, so I don't think it means Gregg's out of the case. However, as far as Mary Anne's concerned, I think that case is absolutely distinguishable. Plaintiff was suing the person who handed him the alcohol. That's not the case here, and Miller says you can -- Miller says just because you were an underage drinker, doesn't mean you can't sue, and that's the controlling precedent of all the cases that the defendant cites, and there is not one single case where the injured plaintiff who consumed alcohol illegally could not assert a claim.

The only two Wisconsin cases that address the issue of an underage consumer could assert a claim is Miller who said it, Meier who acknowledged Miller and held, and Paskiet, which admittedly is prior to the enactment of the statute, allowed an underage consumer to go ahead, so those are the three cases that in any way address that issue. All say we can go ahead; all three of them. This is not a case with a set of facts that we have where any Court says we can't.

THE COURT: What do you make of that language

at Paragraph 24 of Meier, says, abiding by the common understanding of third party, we next examine that term as it is used in the statute. The transactional focus of Section 125.035 (4) (b) is the provision of alcohol to underage persons. The principal parties to such a transaction are; number one, the providers, and number two, the underage drinkers. When the transaction between these principals is a substantial factor in causing harm to a third party, the statutory immunity is lifted and a third party may proceed against a provider. Thus, application of this common definition of third party to Section 125.035 (4) (b) leads to the conclusion that a third party is someone other than the underage drinker or a provider who provides alcohol that is a substantial factor in causing the third party's injuries.

Doesn't that paragraph say that if you are an under -- underage drinker and you end up hurting yourself that you can't bring a lawsuit against providers?

MR. KOWALKOWSKI: It's taken out of context. It -- I believe it may but what we need to remember is that the Court made that statement in the context of a case where the plaintiff was a provider. Additionally, the Meier Court specifically addressed Miller and said

their holding today was not contrary to Miller where a Court allowed an underage consumer. They point-blank get right to the heart of the issue and say our hold is not contrary to Miller where an underage consumer can bring a claim, and I think when you read it in context of the entire case and the comments about Miller, I think what they said about an underage person not bringing a claim was simply in relation to their case. They weren't making a decision in that sense about being a provider of an underage because that was all one person and in their case.

THE COURT: But Miller was going after the underage driver who had been provided alcohol by others and Miller had nothing do with the provision of the alcohol. Although parenthetically I find it interesting that she was involved in the solicitation of the underage -- person of age person to go get the alcohol, but she's not the driver; she's the passenger, and she was given a pass to proceed on the -- the lawsuit. The cause of action that allowed her to sue the providers of the driver who did the injury to her. What would have happened if Miller had been driving that car and had been seriously injured because of her own negligence? Would she have been allowed to proceed?

MR. KOWALKOWSKI: I believe she would have

been if she did not receive the alcohol directly from the provider. She was suing because Miller point-blank says you are not automatically out of the loop simply because you consumed. I think the nature of the negligence which caused a spinal injury isn't the focus. The focus is about a con -- an underage consumer consuming under 125.035.

THE COURT: How -- what about this, if Miller was driving the car and through her negligence, because of her intoxication, she had critically injured herself. She would have not been able to proceed against the providers whether once removed or twice removed. What saved her was she was going after the provider that gave the alcohol to Thomack; Thomack was the person that had been provided the alcohol, Thomack is the one that was doing the driving, and Thomack is the one that negligently caused their grievous injuries.

MR. KOWALKOWSKI: Right, but the reason she was able to go after the Pamperin's Bar and the other defendants is because they were involved in giving the alcohol to Thomack.

THE COURT: What do you make of Paragraph 26 of the Meier case, we find further support for our conclusion that Meier is not a third party under 125.035 (4) (b) in the legislative policy underlying that

provision. In Doering vs. WEA Insurance Group, citation added there, (1995) Supreme Court case, we explained that the legislative policy precludes injured underage drinkers from bringing a cause of action against the provider of the alcohol.

MR. KOWALKOWSKI: Again, the same explanation I have for that previous quote. If it's taken out of the context, that sentence in and of itself may have some merit for the defendant's position, but again, in their case, there was no difference between the injured plaintiff, the provide -- and the provider. They are one of the same. They were illegally consumed and they are providers, and the provider -- the -- the consumer that they are referring to in this case is also a provider, and I think that distinction can be made because, again, what they say about Miller, where he upheld that point-blank safety holding in Miller, is contrary to their discussion in Miller; the underage drinker was not a provider.

THE COURT: But don't they cite Kwiatkowski as still good law for the fact that he, Kwiatkowski, who gets alcohol from the providers, and he's underage and he gets behind the wheel of a car, he can't turn around and sue his providers?

MR. KOWALKOWSKI: Because Kwiatkowski was also

a provider himself; that's the distinction.

THE COURT: No, he wasn't. He was sitting in the bar, the owners were giving him alcohol and his girlfriend, who was his -- his companion for the evening, was also giving him alcohol. In Kwiatkowski, he was just receiving and drinking.

MR. KOWALKOWSKI: Right.

THE COURT: He wasn't a provider.

MR. KOWALKOWSKI: I'm sorry, you're right, he was not a provider, but the distinction, I mean, to draw, he was suing the people that gave him the alcohol; his friend and the establishment, so therefore, he was not of a third party. There were only two people involved in the transaction; he and the person that handed him the alcohol. As far as their case against Mary Anne's concerned, there Craig -- Craig is a third party.

THE COURT: Let me ask you this, if Craig Anderson and Gregory Brasure, after consuming a huge quantity of vodka, had gotten in a car -- I got two scenarios for you; could Craig Anderson sue Gregory Brasure, if he had been the driver and had driven into a tree, such that it was a one car accident, and Craig Anderson was gravely injured because of the driving of Gregory Brasure?

MR. KOWALKOWSKI: I think he could sue him on basic negligence law which would have nothing to do with the statute.

THE COURT: Well, he could sue him under Miller, couldn't he? He could sue -- he could sue Brasure and he could sue the providers to Brasure of the alcohol?

MR. KOWALKOWSKI: Well, I guess it would depend who gave the alcohol to Craig and/or Greg. In the situation where the two of them were just mutually drinking vodka and they get in a car accident, Craig would have a cause of action but it would be under negligence.

THE COURT: But isn't that the identical situation of what you have in Miller? Miller is not a provider and you say that Craig Anderson is not a provider; Miller's in a car with Thomack who's been provided alcohol, but -- Thomack and a couple other underage drinkers, and Thomack crashes the car, and yet Miller can proceed against the providers even though she is a participant in the underage drinking.

MR. KOWALKOWSKI: Right. I mean, Miller was not a provider in the hypothetical. You referenced between Craig and Greg. Again, I think it depends whether or not Craig was a provider of alcohol to Greg,

or Greg to Craig. The providing has to come into play at some point. It's not an issue, are you just a provider or are you just an underage person. The two issues have to be considered jointly.

THE COURT: Are you alleging that there is no evidence in this record that Craig Anderson was doing any providing of alcohol? Similarly there is nothing in the record to suggest that Miller was the provider of any alcohol, but Miller was in a car with Thomack who had been provided alcohol by various providers, and he crashed the car, so my hypothetical, Craig Anderson should be able to sue, as a passenger, Gregory Brasure if they went out and he, Craig or Gregory Brasure, drove the vehicle into a tree and injured Craig Anderson, right? Wouldn't that be perfectly --

MR. KOWALKOWSKI: Yeah.

THE COURT: -- analogous?

MR. KOWALKOWSKI: Yeah, assuming I understand the hypothetical question. If Craig's the passenger and Greg's drunk and goes off the road and hurts Craig, Craig could sue. I agree with that.

THE COURT: What happens if after drinking too much vodka and being highly intoxicated they go for a car ride and Craig Anderson is the driver and he smashes the car into a tree, and the scenario is that Mary Anne

Brasure and Gregory Brasure were, in fact, providing the alcohol to Craig Anderson, could he sue?

MR. KOWALKOWSKI: Again, if Craig's the driver and Greg's an injured passenger, I believe Greg can sue Craig. I thought it was the same hypothetical as the first one. I guess maybe I misunderstood that point.

THE COURT: The first one I had Greg Brasure driving the car highly intoxicated and crashes into the tree causing Craig Anderson injuries, serious injury; the second scenario is that Craig Anderson is driving the car highly intoxicated, crashes into a tree and injures himself severely. If Craig Anderson is driving the car that crashes in the tree because he was highly intoxicated on vodka, can he sue the providers?

MR. KOWALKOWSKI: If he's also a third party.

THE COURT: Is he a third party?

MR. KOWALKOWSKI: In this case -- in this case he would have been because at least as far as Mary Anne's concerned, he did not get the illegally obtained alcohol directly from Mary Anne.

THE COURT: Wouldn't he be in the same place as Mr. Kwiatkowski?

MR. KOWALKOWSKI: Well, the distinction with Kwiatkowski that --

THE COURT: Let me refer to that case here, he

got drunk at a tavern; the tavern owners and his girlfriend were providing drinks. He got in the car and went out, hurt himself severely.

MR. KOWALKOWSKI: Right.

THE COURT: There was not -- he wasn't allowed to sue anybody.

MR. KOWALKOWSKI: This was because the nature of the hand was to sue -- was to sue someone who handed him alcohol was the -- was the distinction here.

THE COURT: I find it interesting in this Supreme Court's decision in Miller vs. Thomack the following paragraph at number 11, it says, this is footnote 11. Another question may be whether the injured party, the plaintiff here, and that's Miller, the 15-year-old girl that was the passenger in the -- the vehicle driven by Thomack, the 16-year-old underage drinker, had got drunk and injured her. They question -- they posed the question whether she could be a third party under 125.035 (4) (b).

The scope of the term, third party, is not apparent in the statute. The defendants did not seek review on or fully argue this question. Accordingly, we decline to address, number one, whether a person who participates in the procuring of alcohol for an underage person may be a third party so as to be able to allege a

violation of 125.07 (1) (a), which I think was subsequently answered in Meier; and two, whether or not -- whether an underage person who consumes alcohol may be a third party so as to take advantage of the immunity exception in 125.035 (4) (b), so the Wisconsin Supreme Court in Miller vs. Thomack, reviewing the Court of Appeals decision, is telling us that they are not addressing the issue of whether an underage person who consumes alcohol may be a third party so as to take advantage of the immunity exception in 125.035 (4) (b).

MR. KOWALKOWSKI: Right, and in the six page substantive, they state the reason they did not was the defendant didn't ask the Supreme Court to review that issue whether an underage consumer can be a third party; therefore, they don't bring it up which takes us back to the controlling precedent of Miller who says the underage consumer can bring a cause of action. If Meier didn't or if -- I'm sorry, if -- yeah, if the Supreme Court in Miller didn't address the issue, then the Appellate Court didn't, and Miller did not have a controlling issue which is why the case could go ahead with the claim. They didn't overrule the Court of Appeals' holding on that issue.

THE COURT: Okay. Anything else?

MR. KOWALKOWSKI: The only other thing I would

mention in the brief from Mary Anne Brasure is that there is nothing in the statute either that would prohibit someone from bringing a claim or being a third party simply because they were an underage consumer, and there is the Court law or the Court case which indicates that you need clear, unambiguous and preemptory language in order to make such a conclusion, absent the statute, significant. Specifically the statute in itself can't prevent our claim, and with which would then lead us to the case which I believe the Court of Appeals in Miller is the controlling precedent which says, an underage consumer is not knocked out simply because he was a consumer.

THE COURT: Mr. Pennow?

MR. PENNOW: Thank you, Your Honor. I just want to make three points, Judge. First off, I can never come to a hearing or other proceeding on one of these cases without bearing carefully in mind here the facts that we're here talking about is a young man who died, and I just want to assure his parents here today that although we are dealing arbitrarily and harshly and clinically with these issues, I think everyone in -- in the courtroom are of cognizance of the tragedy that has befallen them, and the things we have to say are things that derive from the responsibilities as lawyers, and

certainly we don't in any way mean them any disrespect or intend to cause any pain.

Point number two, the Court was exactly on point when it indicated that Kwiatkowski is perhaps the most probative law before this Court today to resolve this issue.

As the Court pointed out, the young person in Kwiatkowski got alcohol from two sources while in that tavern. First he bought it and then directly from the bar owner, Ms. Brasure, if you will, and also from Amy Pedersen, who can be assigned to Greg Brasure. Now, if the plaintiff's position in this case were correct, then young Kwiatkowski could have sued the bar owner for being the indirect or second generation provider who provided alcohol to Amy Pedersen who in turn provided it to the injured plaintiff, but the Court rejected that theory, as well as all the other theories in Kwiatkowski holding that that young person who then went out, injured him because of his intoxication, was barred from suing either the first generation provider or the second generation provider.

THE COURT: Didn't -- in Kwiatkowski though, didn't he buy some directly from the bartender?

MR. PENNOW: He did. He did.

THE COURT: And he bought and the girlfriend

companion bought some during the night for him?

MR. PENNOW: Exactly.

THE COURT: So if he --

MR. PENNOW: All these theories would work and all of them were soundly rejected by the Court.

THE COURT: Do you think it mattered whether the bartender sold it to the girlfriend who gave it to him or that he went directly to the bar and got the alcohol?

MR. PENNOW: The answer is it does not make a difference, Judge, and I think that the point of Kwiatkowski that brings me to my third point, this is actually a very simple case; it's actually a very simple case. When a young person injures himself as a direct result of drinking alcohol illegally, not injuring somebody else, when he injuries himself, when he gets in the vehicle, drives it into a tree, or when he drinks so much that he passes away from that intoxication, the statute is abundantly clear that young person would not be allowed to sue the people who provided him that alcohol in the first place; regardless of the security of his rights, regardless of the legitimacy of the purchase, regardless of anything else.

The policy is that the statute is clear, when young people undertake the consuming of alcohol

illegally and then hurt themselves, they bear the social brunt of that consequence. They take onto themselves the responsibility for their actions. That is clearly the message that the legislature intended to send; that is clearly the -- clearly the message that the Kwiatkowski Court and Doering Court and Meier Court continued to uphold. When you do yourself harm by drinking, under the statute, you can't be heard to sue others for damages.

THE COURT: How is it that Miller is an underage drinker and yet she can still go forward?

MR. PENNOW: I believe the Court hit the nail on the head before and the problem is her harm; she didn't hurt herself, she didn't drink herself to death, she didn't drive her car into a tree; somebody else who was under the influence of alcohol caused that young person's damages. That's why our case is like Kwiatkowski; not like Miller because that -- that case -- frankly, this young man's consumption of alcohol was the only factor, as far as we know, in causing his death. Kwiatkowski, the alcohol was the only factor as far as we know in causing that -- the analogous young person to drive up that road and hit the tree.

THE COURT: Okay. Ms. Hupfer?

MS. HUPFER: Your Honor, I don't have a lot to

add other than to adjoin Mr. Pennow's argument, but I will say that I think a point up -- point first is that we can construe the term, third party, as Mr. Kowalkowski suggests. I think we are kind of torturing the language of what third party is meant. It's clearly meant to encompass the situation as was described perhaps in Miller where there is actually a third party involved in causing the injury. Somehow we are trying make a third party here by involving levels of providers of alcohol. I don't think that's what the legislature meant, and I think we are kind of torturing it to give it that interpretation.

Second, I would, although I join in Mr. Pennow's argument, I agree with the Kwiatkowski's interpretation of third party. Should the Court adopt that interpretation, then I think he can't have it both ways; then Greg Brasure has to be out of the case because Greg Brasure cured the plaintiff's interpretation then because he's a second party, not third party. I do not agree with the interpretation, but if the Court adopts it, then I submit that Greg Brasure has to be out of the case. I think under either scenario he was out of the case because of all the allegations against Greg's providing of alcohol. Thank you.

THE COURT: Anything from the insurance company in this claim?

MR. DUROCHER: Not -- not at this point, Your Honor.

THE COURT: Mr. Kowalkowski, anything else?

MR. KOWALKOWSKI: Yes, I would just like to add the defendants's view of Kwiatkowski simply ignores Miller. Miller indicates that you are not out of the loop as a third party simply because of an underage consumer. That's the controlling precedent that's before the Court. Additionally, this issue about how a third party is defined and how that should be viewed, and in Meier -- and in addition, in the reply briefs that go into and construe a third party, as far as Mary Anne's concerned directly, the Meier Court did; namely, that third party ordinarily describes one who is not a principal to a transaction. That's Meier on Paragraph 23. There is no way anybody could construe Craig as a principal to the transaction between Mary Anne and Greg. He's absolutely a third party. That's a transaction and that he's relying exactly on; even the way Meier viewed how a third party should be defined. Ordinarily means not a principal to the transaction. He wasn't even there. He can be a third party to that transaction, so that issue, combined with Miller, is

involved in the principal transaction. He's one of the principal parties. He, although not a provider, is an underage drinker.

The difference in the Miller case that allowed her to go forward was that she was a passenger in the car and that even though she was an underage drinker, it wasn't her actions that resulted in her significant injury; it was the actions of Mr. Thomack. It's my belief that if Miller, a 15-year-old girl, was involved in a great deal of underage drinking and had been highly intoxicated and she was the one driving the car that night instead of Thomack, she would have been precluded from any cause of action under 125.035 (1) (b) because she caused injury to herself. The only way she evaded the dismissal is the fact that she isn't suing for injuries that she caused to herself because of underage drinking; she is suing Thomack, the 16-year-old boy, who others provided alcohol to illegally, and he's the one that caused the serious accident leading to her injuries.

I think that Craig Anderson in this case is more aligned with Mr. Kwiatkowski than he is with Miller because in this case, he, himself, is making the decision to drink and become intoxicated, and subsequently causes his own death, and that that

situation, I don't think we can construe 125.035 (4) (b) to conclude that he, as a third person, for purposes of suing because he's a principal party to the transaction, and so although the Court understands that -- that this issue might be right for further appellate litigation, in my mind, he can't afford himself of the exception of the immunity under 125.035 (4) (b) because he injured him -- himself and caused his own demise because of his drinking of the alcohol.

Mr. Kowalkowski, where do we go next?

MR. KOWALKOWSKI: Well, I guess the other issue, Your Honor, is there are allegations in issue for Greg Brasure about other negligent acts as well as some intentional acts. There is an allegation of -- or issue question of whether or not there was some type of desire to get Craig excessively drunk; some intentional acts, apparently, that he was taking pictures while he was in a compromising position, and I think those cause of actions would not be barred by the immunity provided under the statute we have been just been discussing, and again, because the defendants have refused to be deposed, unfortunately we have been unable to develop those theories. There's a lot factual balancing out to happen before the allegations in the complaint were sufficient enough to bring some intentional complaints

against Greg.

THE COURT: I take it, Mr. Pennow, you have nothing to say on this point?

MR. PENNOW: That's correct, Judge. Your Honor, and just so my mind is clear, though, do I understand the -- the Court grants my motion for summary judgment on behalf of Mary Anne Brasure?

THE COURT: That is correct.

MR. PENNOW: Thank you, Your Honor.

THE COURT: Ms. Hupfer?

MS. HUPFER: Your Honor, as to Greg Brasure, first I'd like to say I think that all of the other allegations alleged by the plaintiff against Greg are still -- derive out of the same transaction about providing alcohol, and I think that to try to split them up to form a new cause of action to proceed or to move forward is like splitting hairs and trying to count the splits on a baby, and I think that it all goes to continuing that if -- if the Court grants the summary judgment, which I assume it did as to Greg Brasure, the provision of alcohol is similar to Mary Anne. I think on these issues it should, too.

I gave an analogy in my reply brief of this horseplay where during the horseplay someone picks up a rock and throws it and then they try to argue, well,

SUPREME COURT OF WISCONSIN

MARK ANDERSON and
JANET ANDERSON, his wife,

Plaintiffs-Appellants, Appeal No. 02-0980

v.

AMERICAN FAMILY MUTUAL
INSURANCE CO.,

Defendant-Respondent,

MARY ANNE BRASURE,

Defendant-Respondent-Petitioner,

GREGORY L. BRASURE,

Defendant-Respondent.

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS,
MARK ANDERSON AND JANET ANDERSON, HIS WIFE,
ON APPEAL FROM A DECISION OF COURT OF APPEALS
DISTRICT III, DATED NOVEMBER 26, 2002
REVERSING A PORTION OF THE ORDER ENTERED MARCH 11, 2002
OF THE MARINETTE COUNTY CIRCUIT COURT,
HONORABLE TIM A. DUKET, PRESIDING.
CASE NUMBER 01-CV-77

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS, MARK AND JANET ANDERSON

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I. SUPPLEMENTAL STATEMENT OF THE FACTS

The Statement of the Case by defendant-respondent-petitioner is essentially correct. However, certain important facts were omitted and are supplied herein to aid in understanding the Court of Appeals decision.

In her brief to the trial court, Mary Anne Brasure (Mary Anne) stated as follows:

> For the purposes of this motion, the facts alleged in the Complaint will be taken as true. The Complaint alleges that, on or about March 19, 1999, Mary Anne bought her son, the defendant, Gregory L. Brasure (hereinafter "Greg") a 1.75 liter of vodka. The Complaint further alleged that Greg and the plaintiff decedent, Craig Anderson, (hereinafter "Craig") went to a property in rural Marinette County and consumed the vodka.... (A-App. 13; Defendant-Respondent-Petitioner's Brief to Ct. of Appeals @ pg. 9) (emp. added).

Along with the Vodka, Mary Anne left her son a note which stated "Greg, you owe me $12.00." Greg was under the legal drinking age and could not have purchased the alcohol on his own. Craig Anderson (Craig) was not present when Mary Anne purchased the alcohol or provided it to Greg. There is no evidence Craig contributed any money toward the purchase of the alcohol or had any idea of its origin. Craig did not give the alcohol to anyone else.

Craig died on or about March 19 or 20, 1999, as a result of ingesting the vodka provided by Mary Anne. At the

time of his death, he was three years under the legal drinking age as defined by Wis. Stats. sec. 125.02(8)(n) and, therefore, could not purchase alcohol on his own.

II. ARGUMENT

A. PER THE PLAIN LANGUAGE OF WIS STATS. SEC. 125.035 CRAIG IS A THIRD PARTY AND MARY ANNE IS NOT IMMUNE FROM LIABILITY.

Wisconsin Statutes § 125.035 reads, in pertinent part, as follows:

> (2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for selling, dispensing or giving away alcohol beverages to another person. . . .
>
> (3) Subsection (2) does not apply if the person procuring, selling, dispensing or giving away the alcohol beverages causes their consumption by force or by representing that the beverages contain no alcohol.
>
> (4) (a) In this subsection, "provider" means a person, including a licensee or permittee, who procures alcohol beverages for or sells, dispenses or gives away alcohol beverages to an underage person in violation of s. 125.07(1)(a).
>
> (b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party . . . .

A statute must be interpreted on the basis of the plain meaning of its terms. State of WI v. Williquette, 129 Wis.2d

239, 248, 385 N.W.2d 145(1986), citing State v. Wittrock, 119 Wis.2d 664, 350 N.W.2d 647(1984). "Nontechnical words utilized in the statute must be given their ordinary and accepted meaning ...." State of WI v. Williquette, 127 Wis.2d 239, 248.

A plain reading of the statute indicates that someone can be liable for knowingly providing alcohol to an underage person, if the provision of that alcohol is a substantial factor in causing injury to a third party. Contrary to Mary Ann's position, the statute does not say you are only a third party if you did not consume alcohol. Likewise, the statute does not indicate you loose your third party status if your injuries stem from your own consumption. If the legislature wanted to broaden the immunity they would have included such language.

"If the meaning of the statue is clear and unambiguous on its face, the resort to extrinsic aids for the purpose of statutory construction is improper." Ervin v. Kenosha 159 Wis.2d 464, 473, 464 N.W.2d 654(1991). Here "the provider" was Mary Anne, the only "underage person" to whom she gave alcohol was Greg, and the injured "third party" was Craig. Craig was in no way involved in the transaction between Mary Ann and Greg and is therefor a third party. Any other

interpretation of the statute would be contrary to the plain meaning of its terms.

Mary Anne goes on to argue that Craig cannot be a third party because he procured alcohol for himself. Once again, Mary Anne's argument is contrary to the plain language of the statute. The statute uses the words procure and procuring in four places:

> (2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.
>
> Wis. Stats. sec. 125.035(2)(emp. added).

The fact 125.035(2) provides immunity under certain scenarios for those who procure, sell, disperse or give away alcohol "to another person," makes it clear someone who only consumes is not a procurer. The balance of the statute is consistent with this conclusion.

The next reference to the word procure is contained within the following paragraph:

> (3) Subsection (2) does not apply if the person procuring, selling, dispensing or giving away alcohol beverages causes their consumption by force or by representing that the beverages contain no alcohol.
>
> Wis. Stats. sec. 125.035(3) (emp. added).
>
> The statute goes on to state as follows:

> (4) (a) In this subsection, 'provider' means a person, including a licensee or permitee, who procures alcohol beverages for or sells, dispenses or gives away alcohol beverages to an underage person in violation of S. 125.07(1)(a).

Wis. Stats. sec. 125.035(4)(a)(emp. added).

The statutes' last reference to the word procuring is found in Section 125.035(4)(b), which reads, in pertinent part, as follows:

> (b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party. In determining whether a provider knew or should have known that the underage person was under the legal drinking age, all relevant circumstances surrounding the procuring, selling, dispensing or giving away of the alcohol beverages may be considered, including any circumstance under subds. 1. to 4. In addition, sub. (2) does apply if all of the following occur:
>
> 1. The underage person falsely represents that he or she has attained the legal drinking age.
>
> 2. The underage person supports the representation with documentation that he or she has attained the legal drinking age.
>
> 3. The alcohol beverages are provided in good faith reliance on the underage person's representation that he or she has attained the legal drinking age.
>
> 4. The appearance of the underage person is such that an ordinary and prudent

> person would believe that he or she had attained the legal drinking age.

Although an interpretation of subsections 125.03(3)and the latter part of (4)(b)are not before this court, they are cited to show the statute's consistent application of the word procuring. It is always utilized in a sense of obtaining the alcohol for "another person."

Nowhere does the statute say that someone who "keeps" alcohol for themselves is a procurer. Furthermore, you cannot sell, dispense or give away to yourself. You cannot force yourself to consume or represent to yourself that the drink you just made yourself contains no alcohol. You cannot lie to yourself about your age or trick yourself with a fake I.D.. "The court in construing a statute must interpret it in such a way as to avoid an absurd or unreasonable result." State v. Moore 167 Wis.2d 491, 496, 481 N.W.2d 633 (1992).

In Miller v. Thomack, 204 Wis.2d 242, 555 N.W.2d 130 (Ct. App. 1996), the Court recognized that procuring, as the term is used in the statute, deals with procuring for another person. That court stated "in this case, we focus on the term 'procure for.'" Id. at 258. Additionally, the entire analysis of procure in the Miller case dealt with whether or not someone could be found to have procured alcohol for someone else by contributing money to a fund for the purchase

of the alcohol. There is no case law which analyzes the phrase "procure from" as Mary Anne suggests. This is because the statute does not use the phrase "procure from."

Even Mary Anne admits that the focus of the statute has nothing to do with procuring alcohol for yourself. Mary Anne's brief to this court specifically states that "Wis. Stats. sec. 125.035(2) and (4)(a) focus on procuring alcohol for another person...." (Defendant-Respondent-Petitioner's Brief, pg. 8; emp. added).

Mary Ann also claims that Craig is not a third party because he is a "provider" as the term is used in the statute. This argument is without merit, especially since she conceded in her brief to the trial court, that Craig was not a provider. Specifically, Mary Ann stated as follows:

> We acknowledge that the facts in Meier were different from those in the case at bar: the Meier claimant was both an illegal provider and an underage drinker, whereas Craig is alleged to be only an underage drinker. (A-App. 14, Defendant-Respondent-Petitioner's Brief to Ct. of Appeals at Pg. 4).

The first time Mary Anne argued Craig was not a 3rd party because he met the definition of someone who procures or provides alcohol, was in its brief to the Supreme Court.

Additionally, Craig cannot be a "provider" to himself per the very definition of "provider" as found in Wis. Stats. sec.

125.035(4)(a). "Provider" is defined as someone who gives alcohol to an underage person "in violation of s. 125.07(1)(a)." Wis. Stats. 125.07(1)(a) reads in pertinent part as follows:

> (1) ALCOHOL BEVERAGES; RESTRICTIONS RELATING TO UNDERAGE PERSONS.
>
> (a) Restrictions. 1. No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.

Wis. Stats. 125.07(1)(a).

It is unreasonable to construe Wis. Stats. sec. 125.07(1)(a) in such a way that every underage drinker could be charged with a violation of that statute even when it is undisputed they never gave alcohol to anyone else. Craig cannot be charged with a violation of Wis. Stats. sec. 125.07(1)(a) and, therefore, cannot be a provider.

The Court of Appeals correctly applied the plain language of the statute when it recognized that nowhere in the statutes does it say you cannot be a 3rd party if you are also an underage consumer, or if your injuries stem from your own consumption. The Court of Appeals' decision is also consistent with the only rational interpretation of the words "procure" and "provide" as used in the statutes.

B. THE COURT OF APPEALS' DECISION THAT CRAIG IS A THIRD PARTY IS CONSISTENT WITH THE PLAIN LANGUAGE OF WIS. STATS. 125.035 AND THE COMMON LAW.

Contrary to the plain language of the statute and the cases interpreting the statute, Mary Anne argues that since Craig consumed alcohol, he can not also be a third party. That argument is based in part upon an erroneous interpretation of Meier v. Champ's Sport Bar & Grill, Inc., 2001 WI 20, 241 Wis.2d 605, 623 N.W.2d 942 (2001).

In Meier, the 19-year old plaintiff was at Champ's Sport Bar and Grill drinking with his friends, Adam Augustine and Bryan Johnson. Adam Augustine, who was also 19 years of age, later drove a vehicle in which Meier was a passenger. Augustine lost control of the vehicle and Meier sustained serious injuries in that accident. Meier, 2001 WI 20, Par. 3-8.

The evidence relating to the drinking showed that Meier went up to the bar and purchased alcohol for himself and his two companions. Specifically, the Wisconsin Supreme Court found that "Meier and Augustine alternated purchasing rounds." Meier, 2001 WI 20, par. 6. The Meier court found that immunity did exist for the defendants because Meier was directly involved in the procurement of alcohol for the underage driver

Augustine. In reaching this conclusion, the Meier court made the following analysis:

> 'Third Party' ordinarily describes one who is not a principal to a transaction.
>
> Meier, 2001 WI 20, par. 23.
>
> Abiding by the common understanding of 'third party' we next examine that term as it is used in the statute. The transactional focus of § 125.035(4)(b) is the provision of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers. When the transaction between these principals is a substantial factor in causing harm to a third party the statutory immunity is lifted and a third party may proceed against a provider. Thus application of this common definition of third party to § 125.035(4)(b) leads to the conclusion that a third party is someone other than the underage drinker or a provider who provides alcohol that is a substantial factor in causing the third party's injuries.
>
> Meier, 2001 WI 20, par. 24(emp. added).

Mary Anne relies on the language emphasized in the preceding quote. However, this dictum of Meier is incomplete standing on its own and should be read: *a third party is someone other than the underage drinker* ***to whom the alcohol is directly provided.*** The statement must be read this way to avoid misconstruing the entire scope of Meier. The true holdings in Meier is that the person who *provides* the alcohol to an underage person cannot take advantage of Wis. Stats. §

125.035(4)(b) by claiming to be both the provider and the injured third party. Meier, 2001 WI 20, Par. 2.

The Meier court itself confirmed this was the true issue in that case when it held as follows:

> Accordingly, because Meier provided alcohol that was a substantial factor in causing the accident and his injuries, he cannot be considered a third party under the statute. An individual may not provide injury-causing alcohol and also claim to be a third party in order to take advantage of the exception to immunity in an action against another provider.
>
> Meier, 2001 WI 20, Par. 25. (emp. added).
>
> In sum, we hold that an individual, such as Meier, who provides alcohol to an underage person . . . cannot be considered an injured third party.... (emp. added).
>
> Meier, 2001 WI 20, Par. 45 (emp. added).

The true holding of Meier has nothing to do with the fact that the plaintiff was also an underage drinker. This conclusion stems from the court's realization that **"[t]he transactional focus of § 125.035(4)(b) is the provision of alcohol to underage persons."** Meier, 2001 WI 20, Par. 23. In determining if Meier was a third party, the Meier court did not focus on his drinking, it focused on his procuring. The only way Meier would apply to this case is if Craig was the plaintiff and a provider of alcohol just like Meier. However, Craig was not a provider. In Mary Anne's brief to the trial

court, she conceded "the Meier claimant was both an illegal provider and an underage drinker, whereas Craig Anderson is alleged to be only an underage drinker." (A-App-14; Defendant-Respondent-Petitioner's Brief to Circuit Court, pg. 4).

The Court of Appeals in this case applied Meier as follows:

> Mary Anne also ignores the most recent case law to apply Wis. Stat. § 125.035, Meier, which points out at ¶24:
>
> > [T]he *transactional focus* of § 125.035(4)(b) is the *provision* of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers. When the transaction between these principals is a substantial factor in causing harm to a third party the statutory immunity is lifted and a third party may proceed against a provider. (Emphasis added; footnote omitted.)
>
> In this case, there are two transactions. In the first transaction, Mary Anne provided the alcohol to Gregory. In the second transaction, Gregory provided the alcohol to Craig. The transactions are separated by time, location and participants.
>
> When Mary Anne purchased the vodka for Gregory, Craig was not present. Nothing indicates, and indeed, neither Mary Anne nor Gregory suggests, that Craig asked for the liquor, paid for the liquor, or was present for or aware of its purchase. Nothing suggests Mary Anne knew Gregory would give the vodka to others. Mar Anne was not present when the alcohol was shared; only Gregory, Craig and Robert were at the vacation property. Because Mary Anne provided alcohol to Gregory only,

> Craig was a third party to that transaction, and the alcohol was a substantial factor in Craig's death, Mary Anne is not immune from suit under Wis. Stat. 125.035(2).
>
> Anderson v. American Family, 2002 WI App. 315, par. 12, 259 Wis.2d 413, 422, 655 N.W.2d 531 (Ct. App. 2002).

Therefore, Meier's relevance to the case at bar is limited to confirming the fact that having the status of an underage drinker does not take away one's status as a third party.

The Supreme Court's decision in Meier, to not subdivide an evening of drinking into a dozen or so transactions, is consistent with its holding that once you are a provider, you cannot be a third party. Meir v. Champ's Sport Bar & Grill, 2001 WI 20, par. 39, 241 Wis.2d 605, 627, 623 N.W.2d 94 (2001). The focus was clearly on Meir's conduct in procuring alcohol, which is confirmed by the Court's unwillingness "to determine whether such provider may proceed against other providers." Meier, 2001 WI 20, par. 39. Craig was not a provider because he did not "purchase or physically obtain the alcohol" as did Meir. Meier 2001 WI 20, par. 39. Therefore, there is nothing to subdivide.

Additionally, the Meier court acknowledged that an underage drinker can be a third party when it cited with approval the earlier Court of Appeals' decision of Miller v.

Thomack, 204 Wis.2d 242, 555 N.W.2d 130 (Ct. App. 1996). In Miller, the underage plaintiff, Rhonda Miller, solicited Brian Clary, who had attained the legal drinking age, to buy beer for herself, Craig Thomack, and the other defendants. They were all under the legal drinking age. Miller v. Thomack, 204 Wis.2d 242, 250.

Karen Miller, Ransom and Beattie contributed money for the purchase of the beer. Miller, 204 Wis.2d 242, 250. Rhonda Miller did not contribute any money. Miller, 204 Wis.2d 242, 250. After getting the beer, they drove to an unoccupied cabin and later to a beach and all consumed the beer. "No one distributed nor passed the beer purchased by Clary to others, and consumption was voluntary." Miller, 204 Wis.2d. 242, 250. Rhonda Miller along with her drinking companions, went separately to the trunk of the car and got their own beer. Miller, 204 Wis.2d 242, 250. Later that evening Rhonda Miller was injured while a passenger in a vehicle operated by the intoxicated Thomack. Miller, 204 Wis.2d 242, 256.

Miller was allowed to proceed with her claim, even though: (1) she asked the 21-year old to buy the alcohol for herself and the others; (2) voluntarily consumed the alcohol at a cabin and at a beach; (3) got her own alcohol out of the trunk of the car without anyone serving it to her; and (4) was at least arguably contributorily negligent in causing her own injuries.

The Meier court said the following about the holding in Miller:

> In Miller, the Court of Appeals concluded that an underage drinker who had illegally consumed alcohol was a third party and thus able to take advantage of the exception to immunity provided under § 125.035(4)(b). 204 Wis.2d at 262. The court of appeals decision in Miller does not conflict with today's decision which rests upon Meier's conduct in procuring alcohol for Augustine. There the third party was a fellow drinker, but was not deemed a provider under § 125.035(4)(a).
>
> Meier v. Champ's Sport Bar & Grill, Inc., 2001 WI 20 Par. 36, 241 Wis.2d 605, 623, N.W.2d 942 (2001) citing Miller v. Thomack, 204 Wis.2d 242, 262, 555 N.W.2d 130 (Ct. App. 1996).

It is impossible to reconcile Mary Anne's understanding of a third party with the Meier Court's positive treatment of Miller. Craig, just like the plaintiff in Miller, is not precluded from being considered a third party merely because he was a drinker.

The focus now turns to Mary Ann's belief that the claim is still barred because Craig's consumption is what resulted in his injuries. This position is erroneously based on Mary Anne's interpretation of Kwiatkowski v. Capitol Indemnity 151 Wis.2d 768, 461 N.W.2d 150(Ct. App. 1990). In Kwiatkowski, the agents or employees of the Red Lion Entertainment Center (Schmechel) furnished alcohol to the under age plaintiff. Kwiatkowski also received alcohol from

his drinking companion Amy Pederson. Kwiatkowski then operated a motor vehicle and was injured in an accident. Kwiatkowski, 151 Wis.2d 768, 771.

First, Kwiatkowski was not based upon the fact that Kwiatkowski was injured by his own consumption of alcohol. The court stated: "[t]he issue is whether the injury to Pederson (passenger), a third party, strips Schmechel (bar owner) and Pederson of immunity under the statute." Kwiatkowski 151 Wis.2d 768, 774. Secondly, what makes Kwiatkowski completely distinguishable from the case at bar, is that in Kwiatkowski, the alcohol went straight from the providers (both Schmechel and Pederson) to the plaintiff. Kwiatkowski, 157 Wis.2d 768, 771. In other words, Kwiatkowski clearly was not a third party as to Schmechel because he accepted alcohol directly from Schmechel. Likewise, he was not a third party as to Pederson because he accepted alcohol directly from her.

The Court of Appeals in this case explained this concept as follows:

> In Kwiatkowski, *both* Schmechel and Pederson provided alcohol directly to Kwiatkowski. In other words, Kwiatkowski could not be considered a third party....
>
> In the present case, Mary Anne did not directly provide Craig with alcohol. For her to accurately analogize her case to Kwiatkowski, Schmechel could only have served Pederson. Schmechel, however, also served Kwiatkowski. Id. at 771. This is why

> Mary Anne's third contention about Kwiatkowski, that it does not matter to whom the provider gave alcohol, is inaccurate.
>
> Anderson v. American Family, 2002 WI App. 315, par. 8-9, 259 Wis.2d. 413, 420, 655 N.W.2d 531 (Ct. App. 2002).

Kwiatkowski is distinguishable from the facts of this case for the same reason it was found distinguishable by the Court of Appeals in Miller. The Miller court held as follows.

> Kwiatkowski does not resolve the issue before us because the plaintiff in this case (Miller) is alleging that she was injured because the defendants provided alcohol for the underage driver, Thomack. From the perspective of Thomack's illegal consumption of alcohol, Rhonda is the injured third party and, since she is the plaintiff, this could be considered a third party action. Miller v. Thomack, 204 Wis.2d 242, 262, 555 N.W.2d 130 (Ct. App. 1996).

The court of appeals in this case went on to further distinguish Kwiatkowski as follows:

> Mary Anne's second argument about Kwiatkowski seemingly ignores Miller v. Thomack, 204 Wis.2d 242, 264, 555 N.W.2d 130 (Ct. App. 1996), in which we stated:
>
> > We cannot say that it is clear that the legislature intended that a person who provides alcohol to an underage person ... is immune from liability in a suit by [a] third party solely because that third party ... illegally consumed alcohol.
>
> Mary Anne's second contention, that an underage drinker cannot sue the provider when the drinker hurts himself, is true in the case where there is only a first party (the provider) and a second party (the drinker). See Meier v. Champ's Bar &

> Grill, 2001 WI 20, ¶24, 241 Wis.2d 605, 623 N.W.2d 94. However, Miller says that suit is not precluded by an injured third party simply because the third Party may also have been drinking. Miller, 204 Wis.2d at 264. Thus, the Andersons' suit is not automatically preempted as Mary Anne claims.
>
> Anderson v. American Family, 2002 WI Ap. 315, Par. 10, 259 Wis.2d 421, 422, 655 N.W.2d 531 (Ct. App. 2002).

In her brief, Mary Anne also cited dictum from Doering v. WEA Ins. Group, 193 Wis.2d 118, 532 N.W.2d 432 (1995), in support of her position that underage drinkers who themselves are injured cannot bring a cause of action. (Defendant-Respondent-Petitioner's Brief to Supreme Court, pg. 8). What Mary Anne fails to mention is that the Doering case did not involve underage persons. Additionally, the Doering court itself stated that "[t]he sole issue in this case is whether sec. 125.035, Stats. 1991-92, violates the equal protection clause of either the United States or Wisconsin Constitution...." Doering, 193 Wis. 2d 118, 124. Mary Anne also fails to mention that the Doering court relied on the holding in Kwiatkowski where the injured underage drinker got the alcohol directly from the defendant provider. In the case at bar, Craig did not get the alcohol directly from the provider, Mary Anne. Craig is a third party, Kwiatkowski was not.

There is no case, decided after the implementation of Wis. Stats. sec. 125.035, which states that an injured underage drinker, who can otherwise be a third party pursuant to the holding in Miller, loses that status because drinking contributed to the injuries. However, this issue was considered in a case decided prior to the implementation of Wis. Stats. sec. 125.035. In Paskiet v. Quality State Oil Co., 164 Wis.2d 800, 462 N.W.2d 243 (Ct. App. 1990), the court considered a claim remarkably similar to the case at bar. In Paskiet, Quality State Oil Co. sold beer to two underage persons by the names of Kevin Daniels and Robert Lettre. These two underage individuals, in turn, provided the alcohol to the underage plaintiff, Jeffrey Paskiet. Thereafter, Jeffrey Paskiet drank the beer, became intoxicated and was injured when he fell down a hill and over a retaining wall. Paskiet, 164 Wis.2d 800, 803. In other words, his drinking caused his own injuries.

The court indicated that the issue was as follows:

> The question presented is whether a minor, who consumes alcoholic beverages sold by a liquor vendor to another minor, has a negligence action against the vendor for injuries he sustained as a result of his consumption. Paskiet, 164 Wis.2d 800, 803.

The court held that the plaintiff did state a cause of action upon which relief could be granted. The Paskiet court

relied on Sorenson where the Supreme Court "abrogated the common law immunity afforded commercial vendors who sell intoxicating beverages and held that a vendor may be liable to a third party for negligent furnishing alcohol to a minor...." Paskiet, 164 Wis. 2d 800, 805 citing Sorenson v. Jarvis, 119 Wis.2d 627, 350 N.W.2d 108 (1984).

The Paskiet court also cited Koback v. Cook, 123 Wis.2d 259, 366 N.W.2d 857 (1984) in which the Supreme Court found liability for a social host who negligently furnished a minor guest alcohol. Koback, 123 Wis.2d 259, 259.

The injuries sustained by Mr. Paskiet predated implementation of Wis. Stats. sec. 125.035. Therefore, the Paskiet court did not address that statute. However, the Wisconsin Supreme Court later held in Meier that Wis. Stats. sec. 125.035 simply codified the common law, including Sorenson and Koback. Therefore, if a plaintiff could proceed under Sorenson and Koback, and later Paskiet, which relied on these cases, they should be allowed to proceed under Wis. Stats. sec. 125.035. Specifically, the Meier court held as follows:

> Through the sec. 125.035(4)(b) exception, the legislature signaled its approval of the specific holdings of Sorenson and Koback. Using the language of Sorenson and Koback, the legislature allowed for provider liability in substantially the

same circumstances as provided for by those cases.
. . .
Meier 2001 WI 20, Par. 34.

Therefore, the implementation of Wis. Stats. sec. 125.035, after the plaintiff in Paskiet, was injured, does not change the fact that the plaintiff in this case should be allowed to proceed just as the plaintiff was allowed to proceed in Sorenson, Koback and their progeny, Paskiet.

Mary Anne Brasure's liability comes from providing alcohol to an underage person (other than Craig) and that underage person (Greg) using that alcohol in such a way it caused harm to someone else (Craig). It makes no difference if Greg's irresponsible use of the vodka was limited to his own consumption and subsequent intoxicated driving of a vehicle which injured Craig, or if Greg's use of the vodka was to pass it on to Craig who then consumed it and injured himself. In either scenario, Mary Anne is giving alcohol to an underage person whose use of that alcohol resulted in injuries to someone other than the person to whom she gave the alcohol.

C. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE LEGISLATIVE INTENT AND PUBLIC POLICY.

The Wisconsin Supreme Court has held that the purpose of Wis. Stats. sec.125.035 is to deter people from knowingly providing alcohol to minors.

> This interpretation is consistent with Wisconsin public policy expressed in the statute and judicial decisions. The nature and extent of the problem of underage drinking suggest that the legislature intended to broadly prescribe acts which lead to underage drinking....
>
> Miller v. Thomack, 210 Wis.2d 650,667,563 N.W.2d 130 (1997).
>
> In enacting sec. 125.07(1)(a)1 and sec. 125.035(4) the legislature was evidently concerned with deterring dangerous behavior by placing liability on only those who are culpable, that is, those who know or should have known the person was underage.
>
> Miller, 210 Wis.2d 650, 669.

The legislative intent of Wis. Stats. sec. 125.035 is not to give adults the green light to provide unlimited quantities of alcohol to minors with complete disregard for how those minors may thereafter distributes that alcohol. Sound public policy and the statute at issue both mandate more responsible behavior. The progress which has been made in educating people about underage drinking and deterring such conduct would be greatly diminished if someone like Mary Anne was free to provide unlimited quantities of hard liquor to minors and face no civil liability from other minors who may ultimately be injured by that alcohol. Nothing in the legislative history leads to the conclusion that the intent of the statute is to preclude someone like Craig from asserting a claim.

III. CONCLUSION

Mary Anne Brasure's liability stems from providing alcohol to an underage person (other than Craig) and that underage person (Greg), using that alcohol in such a way, it caused harm to someone else (Craig). The Court of Appeals correctly acknowledged that it makes no difference if Greg's irresponsible use of the vodka was to consume it himself and harm someone by driving under the influence or if Greg's use of the vodka was to pass it on to a different underage person who then consumed it and injured himself. In either scenario, Mary Anne is giving alcohol to an underage person, in violation of Wis Stats. 125.07, and causing the death of someone other than the person to whom she gave the alcohol. This interpretation is perfectly consistent with the plain language of the statute. If Mary Anne believes the statutory immunity should be expanded, her argument should be directed to the legislator.

Both Meier and Kwiatkowski are distinguishable. Meier could not proceed because he was a provider of alcohol. Kwiatkowski could not proceed because he was the underage person to whom the providers directly gave alcohol. Craig was neither a provider nor a recipient of alcohol directly from Mary Anne.

The public policy of deterring underage drinking is well served by allowing Craig's claim to survive. Those who knowingly serve minors alcohol should be held accountable for such conduct. The legislator's codification of Sorenson and Koback confirm this was their intent. If Mary Anne never gave a 1.75 liter of vodka to an underage person, Craig would be alive today.

Mark and Janet Anderson respectfully request that the Court of Appeals' decision be affirmed.

Dated this 10th day of June, 2003.

HANAWAY, WEIDNER, BACHHUBER, WOODWARD & MALONEY, S.C.

By: _____
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CERTIFICATION

I certify that the Plaintiffs-Appellants' Appeal from Decision of Court of Appeals, District III, Dated November 26, 2002 conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 24 Pages.

Dated this 10th day of June, 2003.

Frank W. Kowalkowski
State Bar No. 1018119
Attorney for Plaintiffs-Appellant
Mark and Janet Anderson

CERTIFICATION FOR THIRD PARTY COMMERCIAL CARRIER

STATE OF WISCONSIN)
) SS.
BROWN COUNTY)

Karen Spaude, being first duly sworn on oath, deposes and says that she is a secretary of Hanaway, Weidner, Bachhuber, Woodward & Maloney, S.C., that on the 10th day of June, 2003, she contacted Airborne Express to deliver 22 copies of the Brief and Appendix of Plaintiffs-Appellants, Mark and Janet Anderson, of their Appeal From Decision of Court of Appeals, District III, Dated November 26, 2002, to be delivered to the following party:

Ms. Cornelia G. Clark
Clerk, Supreme Court of Wisconsin
110 E. Main Street, Ste. 215
Madison, WI 53701-1688

Karen Spaude
Karen Spaude

Subscribed and sworn to before me
this 10th day of June, 2003.

Carolyn N. Lorenz
Carolyn N. Lorenz
Notary Public, State of Wisconsin
My commission expires 05/08/05.

APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0980 Cir. Ct. No. 01-CV-77

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

MARK ANDERSON AND JANET ANDERSON, HIS WIFE,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, MARY ANNE BRASURE AND GREGORY L. BRASURE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Mark and Janet Anderson appeal a summary judgment finding that Mary Anne Brasure and her son Gregory Brasure are

immune from civil liability under WIS. STAT. § 125.035[1] for providing the Andersons' underage son, Craig, with alcohol. The Andersons also appeal the portion of the judgment that found Gregory was not covered by his father's insurance policy issued by American Family Mutual Insurance Company. While we agree with the trial court that Gregory was immune from suit and not covered by the insurance policy, Mary Anne is not immune from suit. Thus, we affirm the judgment in part, reverse it in part, and remand for further proceedings.

Background

¶2 On or about March 19, 1999, Mary Anne purchased a bottle of vodka for Gregory, who was not yet twenty-one years old. She left it for him along with a note that said, "Greg, you owe me $12.00." Gregory, Craig, and Robert Tripp went to vacation property owned by Mary Anne and her husband, Garth. Gregory, Craig, and Robert drank Gregory's vodka. Tragically, Craig died either late that day or early the next day while at the vacation property with Gregory, and the coroner attributed his death to acute alcohol intoxication. Additional facts will be added to the discussion when relevant.[2]

¶3 The Andersons brought a claim for Craig's wrongful death against Mary Anne, Gregory, and the Brasures' insurer, American Family. Mary Anne

---

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The Brasures apparently told the Andersons that Mary Anne and Gregory were likely to assert their Fifth Amendment rights against self-incrimination at any deposition. We include this information solely for the purpose of explaining our unusually abbreviated factual recitation. For purposes of their summary judgment motions, both Brasures conceded the facts as alleged in the complaint were true. American Family also premised its motion on the facts as alleged in the complaint.

App. 2

and Gregory moved for summary judgment on the basis of WIS. STAT. § 125.035(2), which provides immunity from civil liability arising from providing alcoholic beverages to another. American Family moved for summary judgment on the basis of specific exclusions in its policy. The trial court entered a judgment that (1) granted summary judgment finding Mary Anne immune, dismissing claims against her and American Family; (2) granted summary judgment finding Gregory immune, dismissing claims against him and American Family; (3) granted summary judgment finding that American Family's policy did not cover Gregory; and (4) denied summary judgment regarding American Family's coverage of Mary Anne, stating that there were genuine issues of material fact regarding her coverage.[3] The Andersons now appeal the three parts of the motion that were granted.

Discussion

¶4 We review summary judgments de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk,*** 2001 WI 25, ¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Interpretation of a statute is a question of law we review de novo. ***Kwiatkowski v. Capitol Indem. Corp.***, 157 Wis. 2d 768, 774-75, 461 N.W.2d 150 (Ct. App. 1990).

[3] Parts (3) and (4) apply, according to the court, in the event that the underlying actions against Gregory and Mary Anne respectively are reinstated by further ruling of the trial court or on appeal. The Andersons did not appeal part (4); however, American Family seeks reversal of this part in its response. We will not consider American Family's challenge to part (4) because American Family failed to file a cross-appeal to preserve its rights. *See* WIS. STAT. § 809.10(2)(b) (a respondent who seeks modification of the judgment appealed from in the same action shall file a notice of cross-appeal).

App. 3

¶5 WISCONSIN STAT. § 125.035 provides in part:

> (2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.
>
> ....
>
> (4) ...
>
> (b) Subsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a *substantial factor in causing injury to a 3rd party*. (Emphasis added.)

Mary Anne's Immunity

¶6 Mary Anne argues that she is immune as a provider under WIS. STAT. § 125.035(2) because Craig was not a third party as contemplated in § 125.035(4)(b). She relies, as did the trial court, on ***Kwiatkowski***. Relying on ***Kwiatkowski***, Mary Anne argues:

> 1. An underage drinker who does nothing but drink (e.g., provides only to himself) is not a "third party" and thus cannot take advantage of the nonliability exception to sue those who provided to him;
>
> 2. An alcohol provider cannot be sued by the underage drinker when the underage drinker hurts himself after drinking too much; and
>
> 3. It does not matter whether the alcohol provider gave the alcohol directly to the injured underage drinker, or provided it to another person who in turn provided it to the injured underage drinker: there is no cause of action against either provider.

Mary Anne's reliance on and interpretation of ***Kwiatkowski*** is only partially accurate.

App. 4

¶7 Kwiatkowski, an underage drinker, and his companion, Pederson, were at a bar owned by Schmechel. ***Id.*** at 771. The bartenders—Schmechel's employees—served Kwiatkowski directly. ***Id.*** They also served Pederson, who brought drinks to Kwiatkowski. ***Id.*** At the end of the evening, Kwiatkowski and Pederson got into a vehicle operated by Kwiatkowski and were involved in an accident. ***Id.*** Both were injured. Kwiatkowski alleged negligence per se by Pederson and Schmechel for providing alcohol to a minor, ***id.*** at 771-72, but the case was dismissed after the trial court determined the immunity exception did not apply. ***Id.*** at 774. We affirmed the trial court. ***Id.*** at 777.

¶8 Mary Anne analogizes herself to Schmechel, Gregory to Pederson, and Craig to Kwiatkowski. In ***Kwiatkowski***, however, the question was whether the statute placed limitations on who could be plaintiff. We upheld the trial court's conclusion that the provider's immunity is lost only when the injured third party is a claimant, not when the consumer of alcohol is the claimant. ***Id.*** In ***Kwiatkowski***, *both* Schmechel and Pederson provided alcohol directly to Kwiatkowski. In other words, Kwiatkowski could not be considered a third party as contemplated by WIS. STAT. § 125.035(4)(b).

¶9 In the present case, Mary Anne did not directly provide Craig with alcohol. For her to accurately analogize her case to ***Kwiatkowski***, Schmechel could only have served Pederson. Schmechel, however, also served Kwiatkowski. ***Id.*** at 771. This is why Mary Anne's third contention about ***Kwiatkowski***, that it does not matter to whom the provider gave alcohol, is inaccurate.

¶10 Mary Anne's second argument about ***Kwiatkowski*** seemingly ignores ***Miller v. Thomack***, 204 Wis. 2d 242, 264, 555 N.W.2d 130 (Ct. App. 1996), in which we stated:

> We cannot say that it is clear that the legislature intended that a person who provides alcohol to an underage person ... is immune from liability in a suit by [a] third party solely because that third party ... illegally consumed alcohol.

Mary Anne's second contention, that an underage drinker cannot sue the provider when the drinker hurts himself, is true in the case where there is only a first party (the provider) and a second party (the drinker).[4] *See* ***Meier v. Champ's Bar & Grill***, 2001 WI 20, ¶24, 241 Wis. 2d 605, 623 N.W.2d 94. However, ***Miller*** says that suit is not precluded by an injured third party simply because the third party may also have been drinking.[5] ***Miller***, 204 Wis. 2d at 264. Thus, the Andersons' suit is not automatically preempted as Mary Anne claims.

¶11 Mary Anne also ignores the most recent case law to apply WIS. STAT. § 125.035, ***Meier***, which points out at ¶24:

> [T]he *transactional focus* of § 125.035(4)(b) is the *provision* of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers. When the transaction between these principals is a substantial factor in causing harm to a third party the statutory immunity is lifted and a third party may proceed against a provider. (Emphasis added; footnote omitted.)

In this case, there are two transactions. In the first transaction, Mary Anne provided the alcohol to Gregory. In the second transaction, Gregory provided the

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[4] This is the extent to which Mary Anne's first contention about ***Kwiatkowski*** applies. *See* ***Kwiatkowski v. Capitol Indem. Corp.***, 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990).

[5] This holding is consistent with the plain language of WIS. STAT. § 125.035(4)(b). Its focus is on the alcohol *provided* as a substantial factor in causing the third party's injury.

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alcohol to Craig.[6] The transactions are separated by time, location, and participants.[7]

¶12 When Mary Anne purchased the vodka for Gregory, Craig was not present. Nothing indicates, and indeed neither Mary Anne nor Gregory suggests, that Craig asked for the liquor, paid for the liquor, or was present for or aware of its purchase.[8] Nothing suggests Mary Anne knew Gregory would give the vodka to others. Mary Anne was not present when the alcohol was shared; only Gregory, Craig, and Robert were at the vacation property. Because Mary Anne provided alcohol to Gregory only, Craig was a third party to that transaction, and the alcohol was a substantial factor in Craig's death, Mary Anne is not immune from suit under WIS. STAT. 125.035(2).

Gregory's Immunity

¶13 Gregory provided alcohol directly to Craig. For that reason, Gregory is covered under WIS. STAT. § 125.035(2), which provides immunity when giving alcoholic beverages to another person. The Andersons, however, argue that Gregory was negligent in other ways such that § 125.035(2) is inapplicable. The Andersons allege that Gregory intentionally tried to get Craig drunk and that immunity is lost pursuant to § 125.035(3).[9] The Andersons also

[6] It is undisputed that the alcohol was at least a "substantial factor" in Craig's death.

[7] We do not necessarily intend to prescribe these distinctions as a rigid formula for determining when or whether separate transactions occur.

[8] The Andersons originally pled that Mary Anne gave the alcohol to Gregory or Craig, but later conceded that nothing supported the argument she supplied directly to Craig.

[9] WISCONSIN STAT. § 125.035(3) states that the immunity of § 125.035(2) does not apply if the provider of alcoholic beverages "causes their consumption by force or by representing that the beverages contain no alcohol."

allege Gregory was negligent by failing to supervise Craig's consumption of alcohol, failing to stop serving Craig the alcohol once it was apparent he was intoxicated, failing to obtain medical assistance, and other actions or inactions. The Andersons' arguments are unavailing.

¶14 To prevail on their argument that Gregory acted contrary to WIS. STAT. § 125.035(3) and is thus stripped of immunity, the Andersons must be able to show that Gregory either lied to Craig about the alcoholic content of the drinks Gregory was providing, or they must be able to show that Gregory forced Craig to consume the alcohol. Intent to cause intoxication is irrelevant because it is not mentioned in the statute. While Gregory may have in fact intended that Craig become intoxicated, nothing in the record supports the contention that this was achieved through deceit or force as required by the plain statutory language.

¶15 The Andersons argue that the best way for Gregory to accomplish his posited objective would be by "telling Craig Anderson that the beverage contained no alcohol, or misleading Craig Anderson about the amount of vodka in the drinks" Gregory served. This argument assumes speculative facts. The only evidence the Andersons direct us to is an affidavit their attorney submitted in which the attorney avers that "in a written statement attached to the police report, Gregory Brasure said he helped Craig Anderson from the toilet to the bed and that he poured some Sunny Delight [a nonalcoholic drink] in one of Craig Anderson's drinks without alcohol." The Andersons also claim that the police report states Gregory was mixing the drinks. The Andersons believe this evidence indicates Gregory may have lied about the alcoholic content of the drinks he served to Craig.

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¶16 This evidence fails to support the Andersons' argument. At best, this evidence indicates that Craig had at least one drink that did not contain alcohol. Indeed, had Gregory been lying about the alcoholic content of the drinks he was mixing, one might suspect the Sunny Delight glass would have contained some amount of alcohol. Nothing was pled, nor was any evidence presented, that would indicate Gregory was deceitful about the amount of alcohol in the drinks he provided.[10]

¶17 There is also nothing pled or presented that would suggest Gregory forced Craig to drink the alcohol. Robert Tripp submitted an affidavit in which he stated that all three men voluntarily consumed the alcohol. The Andersons argue that Robert was not at the vacation home all night and therefore could not know what happened at other times, but this provides no support for their claim that Gregory forced Craig's consumption.

¶18 The Andersons' deceit and force argument is premised on mere speculation. Gregory's refusal to be deposed does nothing to change this. The Andersons have failed to make a prima facie case for deceit or force, and Gregory's supposedly intentional acts are not necessarily synonymous with deceitful or forceful ones.

¶19 Gregory's alleged failures to supervise Craig's consumption of vodka and to stop serving him once it was apparent he was intoxicated cannot be separated from the "transactional focus" of WIS. STAT. § 125.035. They cannot

[10] The Andersons also claim that Gregory's refusal to be deposed creates genuine issues of material facts. However, we reject this claim. *See* ¶18, *infra*.

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give rise to a separate cause of action because they are necessarily part of Gregory's provision of the vodka.

¶20 As for Gregory's other actions or inactions, the "basic principle of duty in Wisconsin is that a duty exists when a person fails to exercise reasonable care—when it is foreseeable that a person's act or omission may cause harm to someone."[11] *See* ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶23, 251 Wis. 2d 171, 641 N.W.2d 158. Both Gregory and Craig were at least eighteen at the time—neither was a minor so neither had any heightened duty to supervise the other. Unlike ***Stephenson***, where a man was exposed to liability for offering to drive his drunk co-worker home then failing to do so, nothing suggests Gregory took on any special duty.[12] In short, nothing in the record suggests Gregory had affirmatively assumed a particular duty of care toward Craig.

¶21 In their brief, however, the Andersons argue Gregory was negligent by moving Craig's body once he was unconscious. They argue that once Gregory took the action of moving Craig, he had a duty of reasonable care. *See* ***id.*** Once he assumed that duty, the Andersons contend that Gregory should have called for medical assistance and was negligent by not doing so. Additionally, the coroner noted some abrasions on Craig's body and a small abrasion on his head. The Andersons argue this shows negligence by Gregory.

---

[11] Of course, WIS. STAT. § 125.035 provides an exception to this general rule for the act of providing alcohol to others.

[12] The supreme court said the defendant in ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶24-25, 251 Wis. 2d 171, 641 N.W.2d 158, could be liable based on his affirmative assumption of responsibility for the co-worker, but that he was absolved of liability because of WIS. STAT. § 125.035.

¶22 First, nothing in the record suggests that Gregory knew Craig's situation was so serious as to require medical attention. Second, the toxicology report showed Craig's blood ethanol concentration was .374% and the urine test showed a concentration of .402%. The coroner attributed death to acute alcohol intoxication, not to any of the abrasions. The Andersons fail to show how, as a matter of law, Gregory moving Craig's body was negligent or otherwise a breach of some duty when nothing suggests moving Craig's body contributed to his death.

Insurance Coverage[13]

¶23 The interpretation of an insurance contract and the conclusion as to whether coverage exists under a given contract are questions of law we review independently. ***Ledman v. State Farm Mut. Auto. Ins. Co.***, 230 Wis. 2d 56, 61, 601 N.W.2d 312 (Ct. App. 1999). Assuming Gregory is not immune, the Andersons claim that Gregory should be covered under his father's insurance policy. American Family claims that two exceptions preclude coverage.

¶24 The relevant exceptions state:

> 8. **Illegal Consumption of Alcohol.** We will not cover **bodily injury** or **property damage** arising out of the **insured's** knowingly permitting or failing to take action to prevent the illegal consumption of alcohol beverages by an underage person.
>
> ....
>
> 10. **Intentional Injury.** We will not cover **bodily injury** or **property damage** caused intentionally by or at the

[13] Our affirmance of Gregory's immunity should render the coverage issue moot. We nonetheless choose to address the coverage question to provide American Family with a disposition that is not contingent upon Gregory's statutory immunity.

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> direction of any **insured** even if the actual **bodily injury** or **property damage** is different than that which was expected or intended from the standpoint of any **insured**.

¶25 Exclusion 8 is sufficient to preclude coverage for Gregory. It is undisputed that Gregory knew Craig was underage and that Gregory did nothing to prevent Craig from drinking the vodka. Craig's death resulted solely from the alcohol that Gregory knowingly permitted Craig to drink. Even if we were to conclude that the Andersons' "other actions or inactions" argument had merit, coverage would still be precluded under exclusion 8. We note additionally that assuming the Andersons are correct that Gregory's intention was that Craig become inebriated, coverage would also be precluded by exclusion 10.

Summary

¶26 The portions of the summary judgment finding Gregory immune under WIS. STAT. § 125.035 and dismissing him and confirming the American Family policy does not cover him are affirmed. The portion of the summary judgment finding Mary Anne immune under the statute is reversed. The remainder of the order was not appealed.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

Recommended for publication in the official reports.

App. 12

WISCONSIN CIRCUIT COURT BRANCH II MARINETTE COUNTY

MARK ANDERSON and JANET ANDERSON,

Plaintiffs,

-vs-

AMERICAN FAMILY MUTUAL INSURANCE CO., MARY ANNE BRASURE, and GREGORY L. BRASURE,

Defendants.

Case No.: 01-CV-77

Wrongful Death

Code: 30105

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The defendant, Mary Anne Brasure (hereinafter "Mary Anne"), respectfully submits this Brief in support of her Motion for Summary Judgment.

FACTS

For purposes of this Motion, the facts alleged in the Complaint will be taken as true. The Complaint alleges that, on or about March 19, 1999, Mary Anne bought her son, the defendant, Gregory L. Brasure (hereinafter "Greg") a 1.75 liter bottle of vodka. The Complaint further alleges that Greg and the plaintiff's decedent, Craig Anderson (hereinafter "Craig"), went to a property in rural Marinette County and consumed the vodka, and that Craig consumed so much of the vodka that he died as a result.

SUMMARY JUDGMENT STANDARD

As a method of disposing those cases which present no factual conflict and for which the law is clear, summary judgment is an indispensable component of our judicial

> common definition of third party to §125.035(4)(b) leads to the conclusion that a third party is someone other than the underage drinker or a provider who provides alcohol that is a substantial factor in causing the third party's injuries." [emphasis added]

Meier, 2001 WI 20, paragraph 24.

> Thereafter, the Court had no difficulty in reaching the obvious conclusion:
>
> "25. Accordingly, because Meier provided alcohol that was a substantial factor in causing the accident and his injuries, he cannot be considered a third party under the statute. An individual may not provide injury-causing alcohol and also claim to be a third party in order to take advantage of the exception to immunity in an action against another provider."

Meier, 2001 WI 20, paragraph 25[1].

We acknowledge that the facts in Meier were different from those in the case at bar: the Meier claimant was both an illegal provider and an underage drinker, whereas Craig is alleged to be only an underage drinker. However, based on the foregoing language, the Meier case clearly mandates the conclusion that Mary Anne is immune from civil liability for providing alcohol to a minor who injures himself by drinking it. Craig was not a "third party" under Section 125.035, as the Meier Court has defined that term. Rather, he was a principal to this underage-drinking transaction -- he was an underage drinker -- and therefore his parents' claim against Mary Anne is barred by Section 125.035.

---

[1]The Meier Court also noted in passing that a previous decision, Doering v. WEA Insurance Group, 193 Wis. 2d 118, 532 N.W.2d 432 (1995), had stated ~~in dictum~~ that Section 125.035 "precludes injured underage drinkers from bringing a cause of action against the provider of alcohol." Meier, 2001 WI 20, paragraph 26.

App. 14

SUPREME COURT OF WISCONSIN

MARK ANDERSON and
JANET ANDERSON, his wife,

Plaintiffs-Appellants, Appeal No. 02-0980

v.

AMERICAN FAMILY MUTUAL
INSURANCE CO.,

Defendant-Respondent,

MARY ANNE BRASURE,

Defendant-Respondent-Petitioner,

GREGORY L. BRASURE,

Defendant-Respondent.

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER,
MARY ANNE BRASURE,
ON APPEAL FROM A DECISION OF COURT OF APPEALS-DISTRICT III,
DATED NOVEMBER 26, 2002,
REVERSING A PORTION OF THE ORDER ENTERED MARCH 11, 2002,
OF THE MARINETTE COUNTY CIRCUIT COURT,
HONORABLE TIM A. DUKET, PRESIDING.
CASE NUMBER 01-CV-77

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER, MARY ANNE BRASURE

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ARGUMENT

I. KWIATKOWSKI, NOT PASKIET, IS CONTROLLING IN THIS CASE.

For decades, Wisconsin common law recognized no liability on the part of sellers of alcohol for damages arising from the acts of an intoxicated person. e.g. Farmer's Mut. Auto. Cas. Co. v. Gast, 17 Wis. 2d 344, 117 N.W.2d 347 (1962).

In 1984, the Wisconsin Supreme Court abrogated the common law immunity afforded vendors. Specifically, the Court held that "a vendor may be liable to a third party for negligently furnishing alcohol to a minor when the alcohol so supplied is a substantial factor in causing injuries to a third party". Sorenson v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

In Koback, the Court explained its holding in Sorenson: "[A] reasonable view of appropriate public policy compelled this court to abolish negligent liquor vendors' specious common-law shield from civil liability". Koback v. Crook, 123 Wis. 2d 259, 264, 366 N.W.2d 857 (1985). The Court then extended the Sorenson rule to social hosts who provided intoxicants to a minor where the minor's consumption of alcohol was a cause of injury to a third party. Id.

The Wisconsin Legislature's response to the Wisconsin Supreme Court's policy-driven abrogation of nonliability was to promptly reinstate provider immunity as the general rule

in Wisconsin. The legislature did, however, simultaneously indicate its approval of the Court's limited holdings in Sorenson and Koback by including a narrow exception to provider immunity which permits an injured third party claimant to sustain a cause of action against the "providers" of alcohol to an underage person when the alcohol provided to the minor is a substantial factor in causing the injury to the 3rd party.

Thus, the legislature solidified provider immunity and codified the common law, as it existed in 1985. The legislature did not, however, wholly endorse the "reasonable view of appropriate public policy" or the unfettered abolition of provider immunity adopted by the Wisconsin Supreme Court in 1984.

Wis. Stat. § 125.035 provides in pertinent part:

> (2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.
>
> (4)(a) In this subsection, "provider" means a person, including a licensee or permitee, who procures alcohol beverages for or sells, dispenses or gives away alcohol beverages to an underage person in violation of s. 125.07 (1)(a).
>
> (4)(b) Subsection (2) does not apply if the provider knew or should have known that the underage drinker was under the legal drinking age and if the alcohol beverages provided to the underage person where a substantial factor in causing injury to a 3rd party..

In a case of first impression regarding the interpretation of Wis. Stat. § 125.035 (4)(b), Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990), the Court of Appeals faced the same question as the ultimate question presented here. The Court observed that '[w]hile the statute clearly explains who can be a defendant, it does not state who can be a plaintiff." Id. at 775, 461 N.W.2d 150 (Ct. App. 1990). The Court of Appeals held that an underage minor consumer of alcohol who causes injury to himself as a result of his own intoxication is not a 3rd party and, therefore, may not sustain a cause of action against those who provided him with the alcohol.

In Kwiatkowski, the underage plaintiff, Raymond Kwiatkowski, consumed alcohol at an establishment owned by Schmechel. Id. at 771, 461 N.W.2d 150 (Ct. App. 1990). Kwiatkowski procured alcohol directly and indirectly (through his companion Pederson) from Schmechel's employees. Id. Kwiatkowski was subsequently injured while driving a motor vehicle while intoxicated. Id.

As alleged in the complaint, both Schmechel and Pederson were providers of alcohol to Kwiatkowski. Id. at 768-69, 461 N.W.2d 150 (Ct. App. 1990). The Court of Appeals accepted the relevant facts as alleged as true and did not in any way attempt to distinguish the transactions in which Kwiatkowski directly procured from Schmechel from those in which he procured through Pederson. Instead, the

Court properly focused its attention on whether Kwiatkowski was an injured 3rd party. The Court determined that, as an underage intoxicated person who caused his own injury, Kwiatkowski was not a 3rd party and the immunity exception did not apply. Id.

Kwiatkowski is analogous to the present case in that, like the complaint in Kwiatkowski, the complaint in this case alleges that both Mary Anne and Greg were negligent in "providing alcohol to people under the legal drinking age" (emphasis added) (App. 18 of Brief of Defendant-Respondent-Petitioner, ¶ 15, ¶ 16.) Like Raymond Kwiatkowski, Craig Anderson injured himself as a direct result of his intoxication. Under Kwiatkowski, Craig Anderson is not an injured 3rd party and the immunity exception does not apply.

Although this Court clearly stated in Meier v. Champ's Sport Bar & Grill, Inc., 241 Wis. 2d 605, 625, n.17, 623 N.W.2d 94 (2001), that "cases based upon pre-statutory law but decided after that statute was passed do not bear on the statute's interpretation..", the Andersons nevertheless argue that Paskiet, because it relied on Sorenson and Koback but not Kwiatkowski, should be controlling. In Paskiet v. Quality State Oil Co., 164 Wis. 2d 800, 476 N.W.2d 871 (1991), two underage boys, Lettre and Daniels, purchased beer from the defendant store. Lettre and Daniels subsequently shared the beer with another underage friend,

Paskiet. After becoming intoxicated, Paskiet injured himself when he fell down a hill and over a retaining wall.

The Andersons' reliance on Paskiet is misplaced. Although Paskiet was decided after the enactment of Wis. Stat. § 125.035 and was factually similar to the present case, Paskiet's injury, unlike Craig Anderson's, occurred during the fourteen months between the date of Sorenson and the operative date of Wis. Stat. § 125.035 when provider immunity had been abolished. In Paskiet, the Supreme Court acknowledged the Kwiatkowski holding but indicated it was not controlling in Paskiet because "[Kwiatkowski] was based specifically upon the application of sec. 125.035, Stat., and is therefore inapplicable, since, as stated above, sec. 125.035 does not apply." Id. at 875, 476 N.W.2d 871 (1991).

There can be no question that because Wis. Stat. § 125.035 is applicable in this case, Kwiatkowski, not Paskiet, should control. Just as "[t]he legislature simply drew a line of demarcation in sec. 125.035 beyond which it refused to extend civil liability" (Doering v. WEA Ins. Group, 193 Wis. 2d 118, 148, 532 N.W.2d 432 (1995), so too must this Court. Under Wis. Stat. § 125.035 and Kwiatkowski, Craig Anderson, an underage person who injured himself as a direct result of his over-consumption of alcohol, is not a 3rd party and his survivors are not permitted to avail themselves of the immunity exception.

II. MARY ANNE BRASURE IS A "PROVIDER" OF ALCOHOL TO CRAIG ANDERSON. THEREFORE, CRAIG IS NOT AN INJURED 3RD PARTY AND THE IMMUNITY EXCEPTION OF WIS. STAT. § 125.035 DOES NOT APPLY.

Wis. Stat. § 125.035(2) clearly establishes the general rule of immunity from civil liability arising out of the act of providing alcohol to others. The only exception to the general rule is found in Wis. Stat. § 125.035 (4)(b) which permits a cause of action only if the provider knew or should have known that the person was under the legal drinking age, and if the alcohol provided to the underage person was a substantial factor in causing injury to a 3rd party.

The term "provider" of alcohol, although statutorily defined as one who procures for, sells, dispenses or gives away, has required a substantial amount of judicial interpretation, especially with respect to the term "procure". In each case, the term has been broadly defined. In Miller v. Thomack, 210 Wis. 2d 650, 661, 563 N.W.2d 891 (1997), the Court found that to "procure" did not mean merely to "give" or to "provide something", but necessarily encompassed a wider variety of activities. Rather, the Court, quoting Webster's Third New International Dictionary 1809 (1961), defined "procure" as to "cause to happen or to be done", to "bring about" or to "effect". Id. at 662, 563 N.W.2d 891 (1997).

To illustrate the ease with which a person may be categorized a "provider": A "provider" may be an adult (e.g. Stephenson v. Universal Metrics, Inc., 251 Wis. 2d 171, 641 N.W.2d 158 (2002)) or may be an underage person (e.g. Smith v. Kappell, 147 Wis. 2d 380, 433 N.W.2d 588 (1988)). A "provider" may sell the alcohol (e.g. Sorenson, 119 Wis.2d 627, 350 N.W.2d 108 (1984) or may give it away (e.g. Koback, 123 Wis. 2d 259, 366 N.W.2d 857 (1985)). A "provider" may directly give someone alcohol (e.g. Smith, 147 Wis. 2d 380, 433 N.W.2d 588 (1988)) or may merely make the alcohol proximately available (e.g. Miller, 210 Wis. 2d 650, 563 N.W.2d 891 (1997)). A "provider" may actually purchase alcohol (e.g. Meier, 241 Wis. 2d 605, 623 N.W.2d 94 (2001)) or may merely contribute money towards the purchase of alcohol (e.g. Miller, 210 Wis. 2d 650, 563 N.W.2d 891 (1997)). A "provider" may be one who simply enables another to procure alcohol from an otherwise unwilling source (e.g. Stephenson, 251 Wis. 2d 171, 641 N.W.2d 158 (2002)). A "provider" may do nothing more than "encourage, advise and assist" another to consume alcohol (e.g. Greene v. Farnsworth, 188 Wis. 2d 365, 525 N.W.2d 107 (Ct. App. 1999)).

Mary Anne is a "provider" of alcohol to Craig Anderson because she purchased the alcohol and gave the alcohol to people that she knew or should have known were under the legal drinking age. (Greg and Craig) (Complaint at ¶ 8.) Nevertheless, the Andersons argue that Mary Anne is not a

"provider" of alcohol to Craig. Instead, the Andersons assert, "Mary Anne Brasure's liability comes from providing alcohol to an underage person (other than Craig) and that underage person (Greg) using that alcohol in such a way it caused harm to someone else (Craig)." (Plaintiff-Appellants Brief at pg. 21.)

The Andersons' suggestion that Craig is a 3rd party to the physical transfer of alcohol from Mary Anne to Greg is misguided in that it disregards this Court's decision in Meier, 241 Wis. 2d 605, 623 N.W.2d 94 (2001) in which the Court explained that 3rd party status does not turn on the literal numeric relationship among the actors, but rather on the concept that "the transactional focus of § 125.035 is the provision of alcohol to underage persons. The principal parties to such a transaction are: (1) providers and (2) underage drinkers." Id. at 617-18, 623 N.W.2d 94 (2001). The Court further stated, "Thus, application of this common definition of third party to § 125.035 (4)(b) leads to the conclusion that a third party is someone other than the underage drinker.." Id. at 619, 623 N.W.2d 94 (2001).

The Andersons' argument that Mary Anne is a "provider" only to Greg also fails to properly acknowledge this Court's broad definition of "provider" as applicable to anyone who "brings about" the consumption of alcohol of another. Irreconcilable with the Andersons' attempt to recast Craig Anderson as an injured 3rd party are their own admissions that

Greg and Craig were unable to procure alcohol on their own (Plaintiff-Appellants Brief at pgs.1-2) and but for Mary Anne's provision of alcohol, this tragedy would never have occurred (Plaintiff-Appellants Brief at pg. 24).

Neither Wis. Stat. § 125.035 nor the case law interpreting the same require that a "provider" of alcohol place the alcohol directly into the hand of the underage consumer. For the Court to adopt the arguments of the Andersons would be to directly contradict the plain language of the statute and this Court's own definitions of "provider" and "procure". Mary Anne meets the statutory definition of a "provider" of alcohol to Craig Anderson; therefore, she is immune from civil liability for the injury Craig Anderson inflicted upon himself through his over-consumption of the alcohol she provided.

III. THE WISCONSIN SUPREME COURT'S ARTICULATION OF FACT AND LEGISLATIVE POLICY PRECLUDES THE ANDERSONS' CLAIM.

In Doering v. WEA Insurance Group, 193 Wis. 2d 118, 142-43, 532 N.W.2d 432 (1995), this Court explained that the legislative policy precludes an injured underage drinker from bringing a cause of action against the provider of alcohol and further described how Wis. Stat. §125.035 (4)(b) nevertheless protects underage persons by deterring those who would provide them alcohol. This Court said:

> The fact that *sec. 125.035 does not allow underage drinkers who themselves are injured to bring a cause of action against the person who provided the alcohol beverages* does not defeat the conjectured

> legislative purpose of protecting underage persons. Facilitating compensation for injured underage drinkers is not the only means of attempting to protect people under the legal drinking age. The legislature may have determined that sheltering people under the legal drinking age by deterring those who might otherwise furnish alcohol beverages to them, rather than compensating the injured underage person, would better serve the goal of protecting young people [emphasis added].

The Andersons ask this court to disregard its own proclamation of fact and legislative policy as mere dicta. In their brief, the Andersons state, "[w]hat Mary Anne fails to mention is that the Doering case did not involve underage persons" and ... "the Doering court relied on the holding in Kwiatkowski.." (Plaintiff-Appellants Brief to Supreme Court, pg.18.) What the Andersons neglect to disclose is that this statement of fact and legislative policy, although arguably identifiable as dicta in Doering, is no longer dicta. Because this statement of fact and legislative policy was unequivocally relied upon by this Court in support of its holding in Meier v. Champ's Sport Bar & Grill, Inc., 241 Wis. 2d 605, 619-20, 623 N.W.2d 94 (2001), it is now law and clearly precludes the Andersons' claim against Mary Anne Brasure.

CONCLUSION

Craig Anderson, as an underage consumer of alcohol who injured himself as a direct result of his own over-consumption of alcohol, is not a third party as contemplated in Wis. Stat. § 125.035. Therefore, in accordance with Wis. Stat. §125.035, applicable case law and legislative policy, the Andersons' claim against Mary Anne Brasure must not be permitted to go forward.

Defendant-Respondent-Petitioner, Mary Anne Brasure, respectfully requests that the Wisconsin Supreme Court reverse the decision of the Court of Appeals and reinstate summary judgment in her favor as granted by the trial court.

Dated this 18th day of June, 2003.

DENISSEN, KRANZUSH, MAHONEY & EWALD, S.C.

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CERTIFICATION

I hereby certify that the Brief and Appendix of Defendant-Respondent-Petitioner, Mary Anne Brasure, conforms to the rules contained in Wis. Stat. § 809.19 (8)(b) and (c) for a brief produced with a monospaced font. The length of the Brief of Defendant-Respondent-Petitioner, Mary Anne Brasure, is 11 pages and constitutes 2,349 words, exclusive of the cover sheet, Table of Contents and Table of Authorities.

Dated at Green Bay, Wisconsin this 18th day of June, 2003.

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 02-0980

MARK ANDERSON and
JANET ANDERSON, his wife,

Plaintiffs-Appellants

V.

AMERICAN FAMILY MUTUAL
INSURANCE CO.,

Defendant-Respondent

MARY ANNE BRASURE

Defendant-Respondent-Petitioner

GREGORY L. BRASURE

Defendant-Respondent

APPEAL FROM A DECISION OF COURT OF APPEALS, DISTRICT III, DATED NOVEMBER 26, 2002, REVERSING A PORTION OF THE MARCH 11, 2002 ORDER OF THE MARINETTE COUNTY COURT CIRCUIT, HONORABLE TIM A. DUKET, CASE NUMBER 01-C V-77

BRIEF AMICUS CURIAE OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

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INTRODUCTION AND STATEMENT OF AMICUS CURIAE INTEREST

The Wisconsin Academy of Trial Lawyers ("WATL") is a voluntary bar organization of trial lawyers organized for the purpose of securing and protecting the rights of individual persons, and dedicated to the promotion of the fair, prompt and efficient administration of justice in the State of Wisconsin. Through its Amicus Curiae Brief Committee, WATL seeks to submit amicus curiae briefs to aid courts in determining important questions of law that impact the rights of Wisconsin citizens to obtain fair and just redress for their injuries through the civil court system.

This case arises in the context of the death of a young man, Craig Anderson, due to acute alcohol intoxication. It is undisputed that the alcohol that caused his death was knowingly and intentionally purchased for Craig Anderson's friend Gregory Brasure by Greg's mother, Mary Anne Brasure. Both Mr. Anderson and Mr. Brasure were under the age of 21 at the time. Craig Anderson's parents seek compensation for the death of their son, which would not have occurred but for the negligent — indeed, illegal — conduct of Mrs. Brasure in purchasing the alcohol for her minor son.

The Court of Appeals held that Mrs. Brasure was not immune from civil liability under sec. 125.035, Wis. Stats. The petitioners Mary Anne Brasure and her liability insurer American Family now seek to have this Court reverse that decision. The petitioners want this Court to narrowly construe the statute's third party exception to civil immunity for furnishing alcoholic beverages to minors as only being applicable when the person injured or killed did not himself or herself consume the alcohol.

WATL joins in the arguments set forth in the brief of the plaintiffs-appellants as to why the Court of Appeals' decision should be affirmed. Specifically, WATL agrees with the plaintiffs-appellants that Craig Anderson is a "third party" within the meaning of sec. 125.035(4), Wis. Stats., so as to allow his parents to seek to recover compensatory damages from Mrs. Brasure for her role in causing his death. WATL writes separately to discuss the absurd, unfair and unintended consequences that would result should the petitioners' statutory construction be adopted by this Court, and why the petitioners' suggested standard would prove unworkable in this and future cases. WATL also writes to address why the petitioners'

construction of sec. 125.035(4) runs counter to the public policy underpinning the legislature's creation of the underage exception to immunity set forth in sec. 125.035(4)

As set forth below, to construe sec. 125.035(4) in the manner suggested by the petitioners would lead to absurd and unintended results, by having the adult provider of alcohol's liability or non-liability turn solely upon whether the person injured or killed consumed some of the illegally furnished alcohol. Moreover, underage drinking accounts for a significant number of injuries and fatalities in Wisconsin each year. For that reason, it is the public policy of this state, as established by the legislature in the underage exception to immunity set forth in sec. 125.035(4), to prevent the furnishing of alcoholic beverages to minors. To construe sec. 125.035(4) in the manner urged by the petitioners would fly in the face of this public policy, by granting those who knowingly supply alcohol to minors complete and absolute civil immunity for injuries or deaths resulting from that illegally furnished alcohol.

This Court should reject the petitioners' strained interpretation of "third party" and affirm the Court of Appeals.

ARGUMENT

I. THE PETITIONERS' URGED CONSTRUCTION OF SEC. 125.035(4), WIS. STATS., WILL LEAD TO ABSURD AND UNINTENDED RESULTS, AND PROVE UNWORKABLE IN FUTURE CASES.

It is a cardinal rule of statutory construction that statutes must be construed so as to avoid absurd results. Peters v. Menard, Inc., 224 Wis. 2d 174, 189, 589 N.W.2d 395 (1999); Verdoljak v. Mosinee Paper Corp., 200 Wis. 2d 624, 636, 547 N.W.2d 602 (1996). The petitioners' proffered construction of sec. 125.035(4), Wis. Stats., would do precisely that: lead to absurd, unintended and unfair results.

Under the petitioners' suggested construction, a person under the age of 21 does not qualify as a "third party" within the meaning of the subsection (4) if that person also consumed some of the wrongfully procured alcohol. But suppose Mrs. Brasure had supplied vodka to her son Greg Brasure, who then, in turn, took the vodka over to a neighbor's house where he had agreed to "babysit" for the neighbor's 6 year old child. If Greg Brasure then gave some of the vodka to the child, who then died as a result of acute alcohol intoxication, the parents of that child, under the petitioners' construction of the statute, would have no claim whatsoever against Mrs. Brasure, since their child consumed some of the alcohol. Such a result would be unconscionable.

Additional examples abound that demonstrate the absurd and unintended consequences of such a construction. In this case, Craig Anderson died as a direct result of consuming the vodka. However, what if Craig Anderson had only consumed one mixed drink containing the alcohol early in the evening, but was later run over by a vehicle driven by an intoxicated Greg Brasure and killed, as he was standing outside, perfectly sober by that time? Under the petitioners' suggested statutory construction, Craig Anderson's parents would still be barred from pursuing a wrongful death claim against Mrs. Brasure, because their son had consumed some of the wrongfully procured alcohol. That, too, would be an absurd result.

Consider the following situation -- unfortunately, all too common -- where an underage person solicits an adult to purchase large quantities of alcohol, which the underage person intends to make available at a party for his or her underage friends. Under petitioners' view of sec. 125.035, if any minor in attendance at the party is injured or dies as result of consuming any of that alcohol, the adult who purchased that alcohol would be immune from liability. If, on the other hand, one of those minors in attendance went on to injure or kill someone by driving while intoxicated, the purchasing adult would not be immune.

With respect to the culpable conduct of that adult in procuring the alcohol, such a distinction makes no sense. An adult who knowingly furnishes alcohol to a minor should be held accountable through the civil system for all injuries his or her illegal act was a substantial factor in bringing about.

Underlying all of the petitioners arguments in their briefs to this Court is the point that Craig Anderson was 18 years old at the time, and therefore old enough to have known better. WATL recognizes that in this case, Craig Anderson may not have been completely blameless with respect to his own death. Presumably, he consumed the illegally furnished alcohol of his own free will and accord. WATL in no way condones underage drinking, and Craig Anderson's conduct, in the eyes of a jury, could result in a finding that he bears some contributory negligence with respect to his own death. The problem with the petitioners' proffered standard, however, is that they want to take the issue of the comparative fault of Mrs. Brasure and Craig Anderson completely away from the jury. Under the petitioners' "third party" standard, the conduct of the underage person in drinking the alcohol operates as a complete bar to recovery, even though the culpability of such conduct pales in comparison to that of the adult in furnishing the alcohol in the first instance.

But where is the line to be drawn? As if perceiving the problems with their construction of sec. 125.035(4) as barring any claims if the person injured or killed, regardless of age, consumed some of the alcohol, the petitioners in their statement of issue and elsewhere use the term "adult underage drinker." At what point is the underage person "old enough" so that his or her own drinking should preclude suit against the person ultimately responsible for making the alcohol available? Nowhere does the legislature evince an intent to have the term "third party" turn on such factors as the age of the person injured or killed, or whether that person, himself of herself, consumed some of the illegally furnished alcohol.

In this regard, it is important to remember that sec. 125.035 is in derogation of the common law. In two decisions of this Court that predated the effective date of the statute, this Court announced that those who negligently furnish alcohol to minors may be held liable to those injured as a result. See Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). In Sorensen, this Court stated the following:

> We need reiterate the rationale for holding that the common-law rule of nonliability in this situation should be wholly abrogated....

> Accordingly, we hold that, where there is sufficient proof at trial, a vendor who negligently supplies intoxicating beverages to a minor and the intoxicants so furnished cause the minor to be intoxicated or cause the minor's driving ability to be impaired shall be liable to third persons in the proportion that the negligence in selling the beverage was a substantial factor in causing the accident or injuries as determined under the comparative fault statute.

119 Wis. 2d at 646.

Notably, although sec. 125.035 legislatively abrogated the common law as announced in Sorensen and Koback, it did so only in part, with respect to liability for selling or furnishing alcohol to adults. With respect to selling or furnishing alcohol to minors, the legislature in sec. 125.035(4) codified the common law rule of liability as announced in Sorensen and Koback.

Accordingly, the legislature endorsed this Court's holdings in Sorensen and Koback, that liability may exist in instances where a person furnishes alcohol to a minor, and such act of furnishing the alcohol to a minor is a substantial factor in causing injury to someone else. In such cases, consistent with Sorensen and Koback, it should be left to the jury to decide whether the person who supplied the alcohol bears responsibility, under Wisconsin's comparative fault rules. The petitioners' construction of sec. 125.035(4) represents a request for this Court to retreat from Sorensen and Koback, a request to preclude jury assessment in

cases where the injured person is a minor and consumed some of the illegally furnished alcohol. In this regard, rather than leaving the assessment of the relative fault of the parties to a jury, the petitioners want to hearken us back to a bygone era where any negligence on the part of the plaintiff operated as a complete bar to recovery. WATL respectfully requests that the Court decline the petitioners' invitation to breathe new life into long dead defenses by grafting such a contributory negligence bar onto the statute.

II. THE PETITIONERS' INTERPRETATION OF SEC. 125.035(4), WIS. STATS., FLIES IN THE FACE OF THE LEGISLATURE'S STATED PUBLIC POLICY OF REDUCING UNDERAGE DRINKING.

Underage drinking, both across the nation and within Wisconsin, is a problem of longstanding duration. In its 2001 annual report, the State of Wisconsin Department of Health and Family Services' Bureau of Substance Abuse Services stated that:

> The abuse of drugs and alcohol creates serious health, public safety, economic, and social problems for Wisconsin residents and institutions. A continued challenge lies before policy makers, funding bodies, practitioners, law enforcement, and the general public, to work together to abate alcohol and other drug abuse problems.

Bureau of Substance Abuse Services, Wis. Dept. of Health and Family Services, Statewide Alcohol & Drug Abuse Indicator Trends (2001).

Alarmingly, six of eight youth problem indicators available in the 2001 report had increased from the prior year. Id. at 1. Alcohol consumption, alcohol-related traffic crashes, arrests for operating while intoxicated, and drinking and driving are all on the rise among Wisconsin teens. Id. at 12-14. In 2001, there were 296 teen alcohol-related traffic crashes in Wisconsin. Id. at 12.

According to a 1993 survey, 79.4% of Wisconsin high school students admitted to having drank alcohol at some point in their life, and 48.1% reported that they had drank alcohol within the previous 30 days. Youth Risk Behavior Surveillance -- United States, 1993, Centers for Disease Control (March 24, 1995) (available at http://www/cdc/gov/mmwr/preview/mmwrhtml/00036855.htm). Alarmingly, 29% of Wisconsin high school students reported that they had consumed 5 or more alcoholic drinks on at least one occasion in the previous 30 days. According to a 1997 survey, 50.5% of Wisconsin high school students reported that they had consumed 5 or more alcoholic drinks on at least one occasion in the previous 30 days. Youth Risk Behavior Surveillance -- United States, 1997, Centers for Disease Control (August 14, 1998) (available at http://www/cdc/gov/mmwr/preview/mmwrhtml/00054432.htm). According to this same 1997 study, 28.7 of the high school students surveyed

indicated that they had had their first drink of alcohol before the age of 13. Id.

The State of Wisconsin has consistently increased its efforts to shelter youth from the risks of alcohol. Historically, that effort meant the imposition of a minimum age requirement for drinking. Efforts to gain compliance with the minimum age requirement were primarily centered around enforcement of sec. 125.07, Wis. Stats., which prohibits the provision of alcohol to persons under the legal drinking age. In 1985, as noted above, the legislature enacted section 125.035(4), codifying the imposition of common law liability under certain circumstances on those who provide alcohol to minors. As stated by the Wisconsin Court of Appeals in Miller v. Thomack, 210 Wis.2d 650, 667, 563 N.W.2d 130 (1997):

> In enacting sec. 125.07(1)(a)(1) and sec. 125.035(4) the legislature was evidently concerned with deterring dangerous behavior by placing liability on only those who are culpable, that is, those who know or should have known the person was underage.

In enacting sec. 125.07 and 125.035(4), the legislature recognized that the likelihood of bodily injury or death to a third party dramatically increases when an underage person is provided alcohol. The statutory scheme reflects a legislative recognition that people in Mrs. Brasure's position should appreciate the

effects and dangers of alcohol use by minors, and therefore should not facilitate underage drinking. It reflects a recognition that the incidence of underage drinking can be curtailed if adults act responsibly by not making alcohol available to minors. It reflects a recognition that it is the public policy of this state to discourage adults from entrusting alcohol to those who, due to their age, do not yet have the maturity and wisdom to use it responsibly.

In this case, a mother made the conscious decision to flaunt the law and give her underage son a 1.75 liter bottle of vodka. She allowed him to take it and do with it whatever he pleased with absolutely no supervision. Consistent with the public policy underpinning the enactment of sec. 125.07 and sec. 125.035(4), Wis. Stats., and in light of the increase in underage drinking over the last ten years, this Court should reassert the state's strong disfavor of underage drinking and those who help facilitate it. This Court should reemphasize that it will not tolerate a culture of acceptance among parents who believe it is "OK" to buy alcohol for their minor children to drink and share with their friends.

Granting immunity for such irresponsible conduct as displayed by Mrs. Brasure in this case runs afoul of the public

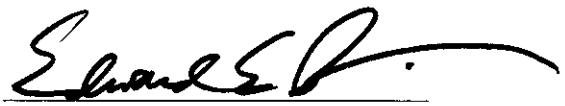
policy that fueled the creation of underage drinking laws, rolls back hard fought efforts to raise awareness about and prevention of underage drinking, perpetuates the abuse of alcohol by underage persons, and validates all too many adults' laissez-faire attitude about the provision of alcohol to minors.

CONCLUSION

For the foregoing reasons, WATL requests that this Court affirm the decision of the Court of Appeals, and permit the parents of Craig Anderson to proceed to trial against Mrs. Brasure in order to have a jury assess her percentage of responsibility in causing the death of their son.

Dated at Brookfield, Wisconsin this 29th day of July, 2003.

WISCONSIN ACADEMY OF TRIAL LAWYERS

By: 

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CERTIFICATION REQUIRED BY SEC. 809.19(8)(D), WIS. STATS.

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b), Wis. Stats. for a brief produced using the following font:

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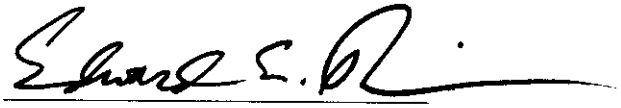
By: 

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